Supreme Court, U. S.
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No. .....

In the Supreme Court of the United States

OCTOBER TERM, 1980

ABBOTT SEKAQUAPTEWA, Chairman of the Hopi Tribal Council of the Hopi Indian Tribe, for and on behalf of the Hopi Indian Tribe and all villages, clans, and individual members of the Hopi Tribe,

Petitioner,

v.

PETER MacDONALD, Chairman of the Navajo Tribal Council of the Navajo Indian Tribe, for and on behalf of the Navajo Indian Tribe and all villages, clans, and individual members of the Navajo Tribe,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Question Presented

At issue in this century-old dispute is the title to over 7 million acres of reservation lands upon which over 80,000 Navajo and Hopi Indians presently reside. In 1934, Congress created the subject reservation "for the benefit of the Navajo and such other Indians as may already be located thereon".* This case involves the determination of the legal effect of the granting language of that Act.

The question of law to be decided is whether the court below erred when it held that the interest granted by the 1934 Act to the Hopi Tribe, as the "other Indians," is limited to lands "occupied, possessed, or used" by Hopi Indians on the effective date of the Act over 46 years ago, or whether the Hopi Tribe's interest is a joint, equal, and undivided interest with the Navajo Tribe consistent with (1) the express statutory language of the 1934 Act, (2) its legislative history, (3) the precedent of the decision in *Healing v. Jones*,** and (4) other applicable principles of law.

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* Act of June 14, 1934, 48 Stat. 960 (the "1934 Act").

**210 F.Supp. 125 (D. Ariz. 1962), aff'd, 373 U.S. 758 (1963) (per curiam).

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No. .....

In the Supreme Court of the United States

OCTOBER TERM, 1980

ABBOTT SEKAQUAPTEWA, Chairman of the Hopi Tribal Council of the Hopi Indian Tribe, for and on behalf of the Hopi Indian Tribe and all villages, clans, and individual members of the Hopi Tribe,

Petitioner,

PETER MacDONALD, Chairman of the Navajo Tribal Council of the Navajo Indian Tribe, for and on behalf of the Navajo Indian Tribe and all villages, clans, and individual members of the Navajo Tribe,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The petitioner Abbott Sekaquaptewa, Chairman of the Hopi Tribal Council, in his statutorily designated representative capacity on behalf of the Hopi Indian

Tribe and its villages, clans, and individual members, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on May 23, 1980.

Opinions Below

The opinion of the Court of Appeals is reported as *Sekaquaptewa v. MacDonald*, 619 F.2d 801 (9th Cir. 1980), and is reproduced in the Appendix (A.1).[1] The Opinion of the District Court for the District of Arizona (R. 860) is reported as *Sekaquaptewa v. MacDonald*, 448 F.Supp 1183 (D. Ariz. 1978), and is reproduced in the Appendix (A. 21). The Partial Judgment (R. 978) and Memorandum and Order of the District Court denying petitioner's motion for reconsideration (R. 958), are also reproduced in the Appendix at A. 48 and A. 52, respectively.

Jurisdiction

The judgment of the Court of Appeals for the Ninth Circuit was entered on May 23, 1980, and this petition was filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Statutory Provisions Involved

This action involves the construction of the Act of June 14, 1934, 48 Stat. 960, which is reproduced in the Appendix (A. 55). This action is prosecuted pursuant

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[1] References to pages of the Appendix are designated "A. .....". References to the record utilized in the Court of Appeals are dsignated "R. .....".

to Section 8 of the Act of December 22, 1974, Pub.L. 93-531, 88 Stat. 1712 at 1715-16, 25 U.S.C. §640d-7, which is also reproduced in the Appendix (A. 62).

Statement of the Case

At issue in this case is beneficial Indian reservation title to approximately 7 million acres of Indian reservation lands in northeastern Arizona, making this one of the largest (if not the largest) quiet title actions in the history of this country.[2] Over 80,000 Navajo and Hopi Indians live in the affected area.

Section 8 of the Act of December 22, 1974, Pub. L. 93-531, 88 Stat. 1712, 25 U.S.C. §640d-7 (the "1974 Act") (A. 62), authorized this quiet-title action in the Arizona Federal District Court between the Hopi and the Navajo Indian Tribes, appearing through the chairmen of their respective tribal councils. Congress authorized this action "for the purpose of determining the rights and interests of the tribes in and to" the lands in issue in the Indian reservation created by the Act of June 14, 1934, 48 Stat. 960 (the "1934 Act"), "and quieting title thereto in the tribes." 25 U.S.C. §640d-7 (a). As to any lands in the 1934 Act Reservation "in which the Navajo and Hopi Tribes or Navajo or Hopi individuals are determined to have a joint or undivided interest [such lands] shall be partitioned by the District Court on the basis of fairness and equity." 25 U.S.C. §640d-7(b).

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[2] Title to the fee is in the United States in trust for the tribe or tribes determined to own the beneficial interest.

The 1934 Act which created the Indian reservation in issue provides:

> *All* vacant, unreserved, and unappropriated public lands . . . within the boundaries defined by this Act, *are hereby permanently withdrawn from all forms of entry or disposal for the benefit of the Navajo and such other Indians as may already be located thereon;* however, nothing herein contained shall affect the existing status of the Moqui (Hopi) Indian Reservation created by Executive order of December 16, 1882. [Emphasis added.]

The complete text of the 1934 Act is set forth in the Appendix (A 62).

The District Court took judicial notice

> that a Hopi village existed at Moencopi on June 14, 1934. Moencopi is within the 1934 Act land grant, and, therefore, the Hopi are within the "such other Indians" clause and are holders of equitable interests.

448 F.Supp. at 1193, R. 873, A. 38.

Based upon the history of the reservation area involved, upon the language and legislative history of the 1934 Act, and upon the subsequent administrative treatment of the lands in issue by the Interior Department, the Hopi Tribe, through the petitioner, asserts herein to be *the* "other Indians" referred to as a grantee in the 1934 Act.[3] As a result, the Hopi Tribe claims to

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[3] The background and legislative and administrative history were presented to the District Court by the parties by means of eight bound volumes of historical documents. Documents submitted by the Hopi plaintiff were designated "Ex. H. ....."; those submitted by the Navajo defendant, "Ex. N. ....."

have received a joint, equal, and undivided interest with the Navajo Tribe in the beneficial Indian reservation title to the lands in issue in the 1934 Act Reservation. The Hopi Tribe's assertion is fully consistent with the only closely relevant precedent, which is found in the case *Healing v. Jones*, 210 F.Supp. 125 (D. Ariz. 1962). *Healing v. Jones* was a decision of a specially authorized three-judge court which construed similar operative granting language. That decision involved the determination of the respective tribal interests of these same Indian tribes in the reservation area known as the "Moqui (Hopi) Indian Reservation created by Executive order of December 16, 1882." The *Healing v. Jones* decision was affirmed by the Supreme Court on direct appeal. *See Jones v. Healing*, 373 U.S. 758 (1963) (per curiam). Properly understood, the *Healing v. Jones* decision supports the Hopi position and is inconsistent with the decision of the court below.

The Executive Order of December 16, 1882, construed in *Healing v. Jones*, created a reservation for the benefit of the "Moqui [Hopi], and such other Indians as the Secretary of the Interior may see fit to settle thereon." The ultimate effect of the *Healing v. Jones* decision was to grant the Navajo Tribe a joint, equal, and undivided interest in 80% of the Hopi 1882 Executive Order Reservation.

In contrast, the courts below have severely limited the interest of the Hopi Tribe in the lands in issue. In construing the "meaning and effect" of the 1934 Act, *see* Pretrial Order No. 1, R. 21-22, the District Court

limited the Hopi Tribe to an interest only in lands occupied, possessed, or used by Hopi Indians on June 14, 1934. The Court then reduced that Hopi interest further, by a factor of one-half, by granting to the Navajo Tribe a joint and equal interest even in those lands.[4]

The District Court's Partial Judgment of June 2, 1978 (R. 978) (A. 48) contained a statement, pursuant to 28 U.S.C. §1292(b), that the Court was

> of the opinion that this judgment involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this order as authorized by 28 U.S.C. §1292(b) may materially advance the ultimate termination of this litigation.

R. 981, A. 51.

The U.S. Court of Appeals for the Ninth Circuit granted both tribes' petitions for interlocutory appeals, and received briefs and arguments on four separate issues, two raised by each tribe. In its opinion dated May 23, 1980, *Sekaquaptewa v. MacDonald*, 619 F.2d 801 (9th Cir. 1980) (A. 1), the Court of Appeals affirmed the decision of the District Court in all re-

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[4] The District Court also dismissed, as being beyond its subject matter jurisdiction under the 1974 Act, the Third Claim for Relief in the Hopi Amended Complaint (R. 597), which seeks an equitable accounting in connection with the partitioning of any jointly held lands. See also Part B of the Opinion of the Court of Appeals at A. 16. The jurisdictional issue relating to the Hopi claim for an accounting under its Third Claim for Relief has been mooted by Section 2 of the Navajo and Hopi Indian Relocation Amendments Act of 1980, Pub.L. 96-305, Act of July 8, 1980, 94 Stat. 929, which expressly provides jurisdiction for relief similar to that requested in the Third Claim for Relief.

spects, except that it determined that the interest of the Hopi Tribe was not automatically reduced by one-half in Hopi utilized areas. Rather, it determined that the Hopis received an exclusive interest in those areas exclusively utilized by Hopis in 1934 and a joint interest in areas then jointly utilized by both tribes. Both courts below failed to recognize the Hopi Tribe's equal and undivided interest in the lands in issue, and have given all lands not utilized by Hopis, whether utilized by Navajos in 1934 or not, to the Navajo Tribe.

The partial judgment of the District Court was affirmed in part, reversed in part, and remanded by the Court of Appeals. This petition followed within 90 days of the opinion of the Court of Appeals.[5]

ARGUMENT

I. The determination of the tribal interests is of significant public importance because it will directly affect title to 7 million acres of land and will affect the residency, cultural, and other interests of over 80,000 individuals.

The Hopi Tribe, through the petitioner, asserts that plenary review of the decision of the court below is appropriate in order: (1) to resolve the question of land ownership involving title to over 7 million acres of lands to which the two tribes make conflicting claims;

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[5] This Court has frequently granted review in cases presenting important unresolved questions of federal law arising from interlocutory appeals under 28 U.S.C. §1292(b). **See, e.g., Hawaii v. Standard Oil Co.**, 405 U.S. 251 (1972); **Fortnightly Corp. v. United Artists**, 392 U.S. 390 (1968); **Schnell v. Peter Eckrich & Sons**, 365 U.S. 260 (1961).

(2) to properly resolve a difficult question of statutory construction of a heretofore unlitigated federal statute, the 1934 Act; and (3) to conform the decision of the court below with the only closely analogous precedent, *Healing v. Jones*, 210 F.Supp 125 (D. Ariz. 1962), *aff'd*, 373 U.S. 758 (1963) (per curiam), a quiet title action between these same two tribes involving Indian reservation lands adjacent to those in issue herein. Because the lands and tribes affected by the 1934 Act are located entirely in Arizona, and because the ownership issues can only be litigated when Congress waives tribal sovereign immunity as occurred in the 1974 Act, 25 U.S.C. §640d-7, there is no reasonable possibility of any subsequent decision or any decision from another circuit providing additional insight into these issues should review be denied at this time.

This case is one of profound importance to over 80,000 Navajo and Hopi Indians who inhabit these arid northern Arizona lands, since tribal ownership will determine residency and other rights in the area for the Tribes and their individual members now and in future generations. *See* the 1974 Act, 25 U.S.C. §§640d-12 and -13, regarding the relocation of individual Indians from lands partitioned to other than their own tribe. The lands in issue are approximately equal in size to the combined areas of the States of Delaware and Maryland. The area is *three times as large* as the area which was in dispute between these tribes in *Healing v. Jones*, which dispute was characterized in an opinion affirmed by this Court as "the greatest title problem of the West." 210 F.Supp. at 129.

In the last 6 years Congress has considered the division of interrelated Hopi and Navajo reservation claims and interests, including those in issue herein, to be of sufficient importance to have twice legislated on the subject. *See* the 1974 Act, *supra*, 25 U.S.C. §§640d to 640d-24, and the Navajo and Hopi Indian Relocation Amendments Act of 1980, *supra*, note 4. This has occurred because the matters involved are of significant public interest and because they defy easy solution by conventional means.

As noted by the District Court, the past history of Navajo-Hopi land disputes, including ***Healing v. Jones*** and its extensive supplemental proceedings,[6]

> documents both the bitter antagonism between the Navajo and the Hopi and the difficulties attending a judicial resolution of Navajo-Hopi land controversies.

448 F.Supp. at 1186, R. 862, A. 22.

These difficulties result, in large part, from the profound cultural and historical differences between these two tribes. As documented by *Healing v. Jones*, the Hopis traditionally have been "a timid and inoffensive people, peaceable and friendly with outsiders," having, since at least the year 1541, been "living in villages on mesa tops, cultivating adjacent fields, and tending their flocks and herds." 210 F.Supp. at 134. By con-

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[6] **See Hamilton v. Nakai**, 453 F.2d 152 (9th Cir. 1971), **cert. denied**, 406 U.S. 945 (1972); **Hamilton v. MacDonald**, 503 F.2d 1138 (9th Cir. 1974); **Sekaquaptewa v. MacDonald**, 544 F.2d 396 (9th Cir. 1976), **cert. denied**, 430 U.S. 931 (1977); and **Sekaquaptewa v. MacDonald**, 575 F.2d 239 (9th Cir. 1978).

trast, the Navajos, who did not enter Arizona until the last half of the eighteenth century, have been traditionally "of an aggressive nature," "semi-nomadic or migratory," with a "proclivity to commit depredations against the Hopis," who were being "constantly overridden by their more powerful Navajo neighbors." 210 F.Supp. at 134-36. By 1934, such Navajo encroachment had carried them far beyond their exclusive reservation along the Arizona-New Mexico border where, in 1868, they had promised to remain. Navajo Treaty of June 1, 1868, 15 Stat. 667, Ex. H. 10, Ex. N. 1. *See Healing v. Jones*, 210 F.Supp at 135-37.

The decision of the court below will reward the Navajos for their aggressive behavior by giving them not only all of the lands that they had taken from the Hopis by 1934, but also a vast new domain of lands not then utilized by either Tribe. The Hopis, by contrast, will be "rewarded" for their peaceful conduct by being confined to lands used on a date more than 46 years ago, with a one-half Navajo interest in many of the areas they had then managed to continue to utilize, and with absolutely no additional lands on which to grow and develop.

Such results not only offend traditional American notions of fair play, but they impute to the 1934 Congress a grossly discriminatory execution of the trust responsibilities which it owed equally to both of these dependent Indian groups. The present day social implications of such a result to these tribes is of profound importance, since the reluctance and refusal of the

Navajo Tribe and its members to recognize litigated rights and to honor court decrees, *see* the contempt proceedings reported in *Sekaquaptewa v. MacDonald*, 544 F.2d 396 (9th Cir. 1976), *cert. denied*, 430 U.S. 931 (1977), has already, to a large degree, provided the motivation for Congress to enact the 1974 Act, 25 U.S.C. §640d *et seq* and the 1980 amendments thereto, *supra* note 4.

Review by the Supreme Court and a definitive opinion at this time regarding the proper construction of the 1934 Act, before either tribe is put to the very difficult and expensive burden of proving its historical land utilization patterns on a fixed date over 46 years ago, would both potentially avoid that unintended, very onerous litigation burden on the tribes and, it is hoped, would also decrease the extent of subsequent inter-tribal disputes over the 1934 Act lands, which disputes have so plagued the tribes, as illustrated by the *Healing v. Jones* supplemental proceedings.

II. The Court below erred in limiting the Hopi interest to other than a joint, equal, and undivided interest with the Navajo Tribe.

A. The decision below is not consistent with the legislative history of the statutory language.

Petitioner respectfully submits that the decision of the court below in limiting the extent of the Hopi interest is not only of great public importance because of the large area and number of people affected, but

that it is manifestly wrong. The Court of Appeals, in reviewing the District Court's construction of the "meaning and effect" of the 1934 Act, stated:

> We acknowledge the absence of a Navajo-Hopi boundary, as we must. . . .
>
> Congress was not inflexibly committed to the notion of exclusive areas for the two tribes. It preferred to allow the tribes to work out whatever cooperative arrangement they could.

619 F.2d at 807, A. 14-15. The District Court acknowledged that

> the Bureau of Indian Affairs and the Congress eliminated all reference to a separate and segregated reservation for the Hopi within the land affected by the 1934 Act. A federal court cannot arbitrarily draw boundary lines where Congress has chosen not to do so.

R. 958, A. 52.

Yet, notwithstanding these acknowledgments that Congress did *not* intend to establish boundaries defining the extent of the Hopi interest based upon then (1934) existing criteria, the courts below have construed the "such other Indians as may already be located thereon" language of the 1934 Act as a limitation defining the territorial extent of the Hopi interest, limiting it to those particular lands, which necessarily have boundaries to the extent of their separate existence, which the Hopis were "occupying, possessing, or using" on the effective date of the 1934 Act. Thus, in the process of determining the "meaning and effect" of the 1934 Act, the courts below have inferred criteria which

necessarily define the Hopi boundaries as of June 14, 1934, *contrary* to what each Court recognized that Congress intended.

Prior to enacting the 1934 Act, the drafters of the legislation specifically rejected the idea of legislating a defined boundary to the Hopi interests, *see, e.g.*, Ex. H. 125, Ex. N. 86, and also rejected a proposal to allow the Secretary of the Interior to set such boundary, *see* Ex. H. 137, Ex. N. 93. It is manifest error for the court below to have imposed an implied boundary, set by the areas of Hopi use and occupancy, in light of the specific rejection of such boundaries by Congress. The 1934 Congress simply decided to grant an equal and undivided interest to both the Navajo and Hopi Indians because it found it inexpedient to legislate a division of tribal interests. The 1974 Congress has now supplied the criteria for setting a boundary and partitioning the reservation lands. *See* 25 U.S.C. §640d-7(b), A. 62:

> Any lands in which the Navajo and Hopi Tribes or Navajo or Hopi individuals are determined to have a joint or undivided interest shall be partitioned by the District Court on the basis of fairness and equity. . . .

The result brought about by the decision below contradicts the only specific legislative history in the record of the "other Indians" clause. Such history is found in a letter dated September 22, 1932, from the Commissioner of Indian Affairs to a Hopi supporter. This letter was written at the time the draft bill of

what became the 1934 Act was first altered to insert the "other Indians" language as finally adopted by Congress.

> Your particular attention is invited to page 4, lines 6, 7 and 8, reading as follows:
>
> "are hereby permanently withdrawn from all forms of entry or disposal *for the benefit of the Navajo and such other Indians as may already be located thereon*".
>
> It will be readily seen that *this language will fully protect the rights and interests of the Hopi Indians within the area covered by the proposed bill* until such time as the Hopi Indians themselves agree to some definite boundary, which we hope will be somewhat along the lines indicated on the enclosed blue prints. [Emphasis added.]

Ex. H. 138A at 724A, Ex. N. 94. Based upon their historical use of the whole area, the Hopis then (in 1932) claimed an interest in all of the lands in issue, though their areas of occupancy at that time had been greatly restricted by the encroaching Navajos. *See, e.g., Healing v. Jones*, 210 F.Supp. at 134, 136, 187. The Hopis have never agreed to accept less than their full, equal share of the lands in issue.

Thus, the "area covered by the proposed bill" within which Hopi interests were expressly intended to be protected by the "other Indians" phrase included *all* of the lands in issue herein. No other meaning or intent was ever ascribed to the "other Indians as may already be located thereon" language between the time

when this letter was written and the enactment of the 1934 Act by Congress.

B. The decision below is not consistent with the plain and accepted meaning of the words of the 1934 Act.

The result reached by the court below contradicts the express language of the 1934 Act in setting apart "All" of the defined areas for the benefit of both tribal grantees, without expressed limitation as to either.

The court below has erroneously interpreted the "other Indians . . . located thereon" language in the 1934 Act as words of limitation, defining the extent of the grant, rather than words of purchase, identifying a grantee. *See* Part E of the District's Court's opinion, 448 F.Supp. at 1193-96, R. 874-81, A. 38-46; Part II, A, 2. of the Court of Appeals' opinion, 619 F.2d at 805-06, A. 9-12. This interpretation is contrary to the accepted judicial construction of such words in Indian legislation. In *Fairbanks v. United States,* 223 U.S. 215, 225 (1912), this Court expressly construed the words "Indian located thereon" as words of purchase in an Indian allotment act as follows:

> [T]he language is: 'To each *Indian located thereon,* one-eighth of a section of land.' The conclusion that plaintiffs draw from that provision is that being on the reservation at the instant of time the act was passed is a necessary condition. But such conclusion misses the meaning of the word "located." Of itself it has no reference to time. It has reference entirely to place, and *is used to designate upon what Indians the powers given by the act, when exercised, should operate,* — that is, "to each Indian

located" on the reservation. [Emphasis added.]

Thus, contrary to the holding of the court below, the words "located thereon" in analogous Indian legislation have been construed as words of purchase, identifying grantees, not as words of limitation defining the extent of the grant. *See also* Section 1 of the General Allotment Act of February 8, 1887, 24 Stat. 388, as amended, 25 U.S.C. §331, using the terms "Indians . . . located upon" and "Indian located thereon" as words of purchase to identify which Indians would be entitled to allotments under that Act. The opinion below fails to distinguish or even mention these closely relevant statutes. The result reached by the court below in construing the words "Indians located thereon" as words of limitation relating to only the Hopi interest is thus contrary to the established usage of those words in Indian legislation.

Indeed, the court below has construed the phrase "located thereon" to mean "occupy, possess, or use" notwithstanding the fact that the 1934 Act, in the sentence following the "located thereon" language, expressly uses the phrase "occupy and use" in regard to the rights of the "Indians" to utilize lands set apart for water-power sites within the reservation.[7] Congress

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[7] Following the operative granting language of the 1934 Act as quoted hereinabove, the Act provides as follows:

> There are hereby excluded from the reservation as above defined all lands heretofore designated . . . as being valuable for water-power purposes and all lands withdrawn or classified as power-site lands, saving to the Indians, nevertheless, the exclusive right to occupy and use such designated and classified lands until they shall be required for power purposes . . . . 1934 Act, 48 Stat. at 961, A. 57-58. [Emphasis added.]

therefore did use the terms "occupy and use" in the 1934 Act when those terms were intended; the propriety of impliedly equating "located thereon" with "occupy, possess or use" under such circumstances would thus be questionable even without the other considerations developed herein. Indeed, despite its contrary holding, the District Court observed, "If Congress wished to limit the 'such other Indian' grant to land actually occupied, Congress could do so in plainer language." 448 F.Supp. at 1193, R. 875, A. 40.

C. The decision below is not consistent with the decision in *Healing v. Jones* as affirmed by this Court.

The position of the Hopi Tribe, through petitioner, is consistent with the only closely relevant precedent, which is provided by the case *Healing v. Jones*, 210 F.Supp. 125 (D. Ariz. 1962), *aff'd*, 373 U.S. 758 (1963) (per curiam) (herein "*Healing v. Jones*").

Healing v. Jones was the first major quiet title action between the Hopi and Navajo Indian Tribes. It was prosecuted pursuant to a special jurisdictional act under which the tribes were permitted to litigate the extent of their respective tribal titles to lands located within and surrounded by the lands in issue in this case. *See* the Act of July 22, 1958, Pub.L. 85-547, 72 Stat. 403, reproduced at 210 F.Supp. 129 n. 2. Those lands (in the Executive Order Reservation established on December 16, 1882) were expressly excepted from the effect of the 1934 Act and from the jurisdiction of the courts herein. *See* 25 U.S.C. § 640d-7(a), A. 62-63.

Healing v. Jones provides a significant precedent for this case because it construed operative granting language similar to that in the 1934 Act, referring to "other Indians" as grantees along with a named tribe. It is also significant because the 1882 Executive Order construed in *Healing v. Jones* is specifically referred to in the 1934 Act grant. In the 1882 Executive Order, the Hopis ("Moquis") were the named tribe and the Navajos were the "such other Indians":

> [The described area] be and the same is hereby withdrawn from settlement and sale, and set apart for the *use and occupancy of the Moqui [Hopi], and such other Indians as the Secretary of the Interior may see fit to settle thereon.* [Emphasis added.]

See 210 F.Supp. at 129 n. 1 for the complete text of the 1882 Executive Order.

The *Healing* court held that the "self-operating effect" of the language of the 1882 Executive Order granted the Hopi Indians an immediate interest throughout the entire reservation. *See* 210 F.Supp. at 175. The *Healing* court then considered the question of what interest, if any, had been granted to the "other [Navajo] Indians" by that Executive Order. The Navajos contended that the "such other Indians" clause also granted them immediate rights throughout the entire reservation. *See* 210 F. Supp. at 139. The court stated that a "such other Indians" clause would have granted such immediate and coextensive rights *if* it had used language such as "and other Indians *now settled* there." *See* 210 F. Supp. at 140 [emphasis added].

This reasoning applies in the case at bar. The 1934 Act granted reservation rights to the "Navajo and such other Indians as may *already be located* thereon," and such a grant results in the vesting of an immediate, co-extensive, equal, and undivided interest in the "other [Hopi] Indians."

Unlike the interest of the "other [Hopi] Indians" under the 1934 Act, the interest of the "other [Navajo] Indians" in *Healing v. Jones* was subject to an express condition subsequent of settlement by the Secretary of the Interior before they could obtain interests in the reservation involved. *See* 210 F. Supp. at 144. No such condition subsequent is found in the 1934 Act and, therefore, both tribes received identical statutory interests throughout "All" (as the Act says) of the lands in issue at the time of, and by the force of, the enactment of the 1934 Act. Under the 1934 Act, therefore, both tribes are in a position comparable to that of the Hopi Tribe under the 1882 Executive Order and both received equal, undivided interests by the "self-operating effect" of the 1934 Act. *See Healing v. Jones*, 210 F. Supp. at 175.

Such a holding is in accordance with established rules of construction which dictate that a conveyance to two or more grantees, without the specification of criteria to differentiate the interest received by each, results in equal, undivided interests in the grantees. *See, e.g., Page v. Hoxie*, 104 F.2d 918, 921 (1st Cir. 1939); *Thompson on Real Property*, Vol. 4 (1961 Repl. Ed.), Section 1797 at 125-26; 86 *C.J.S. Tenancy in Common* §§7, 18 (1954).

The Hopi Tribe thus bases its claim herein to a joint, equal, and undivided interest upon the "self-operating effect" of the 1934 Act in granting an interest in "All" of the area in question to two grantees, the Navajos and the "other [Hopi] Indians." Based upon the legislative history, there can be no reasonable question but that the Hopis were intended by Congress to be *the* "other Indians." The Hopi interpretation is fully consistent with *Healing v. Jones*, as affirmed by this Court, and is fully consistent with both the language and legislative history of the 1934 Act itself.

III. The court below has inferred a standard of proof, not intended by Congress, which will impose a very onerous litigation burden on the Hopi Tribe.

In limiting the interest of the Hopi Tribe to a test dependent upon "occupation, possession, and use" as the court below has done, the Hopi Indian Tribe will be put to the very difficult burden of proving its historical land utilization patterns and practices on a fixed date over 46 years ago. Such a burden was never intended by the Congress which passed the 1934 Act.

Early drafts of the bill which became the 1934 Act either specifically defined areas of exclusive Hopi interest, or delegated authority to define such areas to the Secretary of the Interior. The Hopis protested against such language and it was eventually removed from the Act, leaving no legislatively established criteria for differentiating the interests received by the two tribes. *See* Memorandum for the Commissioner of In-

dian Affairs dated February 12, 1941, "Creation of the Hopi Unit Within the Boundaries of the Navajo Reservation," *Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs 1917-1974*, Vol. 1, 1032 at 1034. *See also* a letter written in 1933 by Arizona Senator Hayden, the chief sponsor of the 1934 Act, to a friend interested in the Hopi situation:

> You wrote me last April suggesting that if legislation were passed that there be included therein the establishment of a separate reservation for the exclusive use of the Hopi Indians. I started out to do that very thing but ran into so many difficulties that I was obliged to abandon the idea.

Ex. H. 149 at 817, Ex. N. 103.

Congress in 1934 intended to deal fairly with both tribes. It did not intend to impose upon only the Hopis the responsibility of proving their then (1934) land utilization patterns at some future, unknown date, while at the same time providing a vast new exclusive domain for the Navajos without proof of anything. If not reviewed and reserved by this Court, these unintended results will be visited upon the Hopi Tribe by the decision of the court below, which decision has been ostensibly confined to determining the "meaning and effect" of the 1934 Act.

CONCLUSION

Petitioner submits that "equal justice under law" dictates that the decisional standards applied in this

case be consistent with the decisional standards applied in *Healing v. Jones*, in which the Navajo Tribe, under an "other Indians" grant, received a one-half interest in 80% of the Hopi Tribe's 1882 Executive Order Reservation. Congress in 1934 did not intend to limit the Hopi Tribe to its then areas of utilization while providing a vast new domain for the Navajo Tribe. Indeed, Congress specifically rejected legislative proposals to establish defined boundaries for the Hopi interest. Congress in 1934 certainly did not intend to make the extent of the Hopi interest dependent upon its ability at some future, unknown time to document and prove its precise land utilization patterns and practices, as the court below would now require. Congress would have made some express provision for documenting the extent of Hopi utilization, or otherwise manifested that as the test, had it intended such a result.

As one court has aptly noted, "It is to be presumed, in construing a statute, that an injustice was not intended to result."[8] This Court has noted that "[t]he overriding duty of our Federal Government to deal fairly with Indians wherever located has been recognized by this Court on many occasions."[9] Petitioner respectfully suggests that the court below has departed from its proper role in determining the meaning and effect of the 1934 Act. It has decreed an implied boundary where Congress had rejected such a boundary, bringing about a result which causes a substantial injustice to the Hopi Tribe. That result was never

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[8] **Douglas v. Wirtz**, 232 F. Supp. 348, 353 (M.D.N.C. 1964).
[9] **Morton v. Ruiz**, 415 U.S. 199, 236 (1974).

intended by the 1934 Congress which used statutory language specifically designed to protect the Hopi interests.

The vastness of the land area involved, coupled with the tens of thousands of people whose lives and homes will be affected by the outcome of this case, make it appropriate for a definative review at this time to resolve these fundamental title questions upon which years of subsequent litigation will necessarily depend.

For the reasons stated above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals.

Respectfully submitted,

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APPENDIX A

PROCEEDINGS IN THE LOWER COURTS

[619 F.2d 801]

Abbott SEKAQUAPTEWA, Chairman of the Tribe, for and on behalf of the Hopi Indian Tribe and all villages, clans, and individual members of the Hopi Tribe, Appellant-Cross-Appellee,

v.

Peter MacDONALD, Chairman of the Navajo Tribal Council of the Navajo Indian Tribe, for and on behalf of the Navajo Indian Tribe and all villages, clans, and individual members of the Navajo Tribe, Appellee-Cross-Appellant.

Nos. 78-3504, 78-3505.

United States Court of Appeals,
Ninth Circuit.

Filed: May 23, 1980.

Appeal from the United States District Court for the District of Arizona.

Before ANDERSON and SKOPIL, Circuit Judges, and BONSAL,* District Judge.

SKOPIL, Circuit Judge:

These are interlocutory cross-appeals from a partial summary judgment in a quiet title action. The action was brought to determine the respective property in-

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* The Honorable DUDLEY B. BONSAL, Senior United States District Judge for the Southern District of New York, sitting by designation.

terests of the Navajo and Hopi tribes in the reservation withdrawn by the act of June 14, 1934, 48 Stat. 960 (hereafter "the 1934 Act"). We are also asked to decide whether the district court had jurisdiction over the Hopi claim for an accounting for all Navajo activities on land in which the Hopi Tribe has an interest. We affirm in part and reverse in part.

The Hopis have inhabited the area in controversy "[a]s far back as the Middle Ages." *Healing v. Jones*, 210 F.Supp. 125, 134 (D.Ariz.1962), *aff'd*, 373 U.S. 758, 83 S.Ct. 1559, 10 L.Ed.2d 703 (1963). The Navajos probably entered the area in the last half of the eighteenth century. *Id.* By treaty in 1868 the United States granted the Navajos an extensive reservation in the northeast corner of Arizona. 15 Stat. 667. The reservation was gradually expanded by a series of executive orders beginning in 1880 and continuing to 1918. An 1882 executive order withdrew a reservation (hereafter "the 1882 reservation") for the Hopis "and such other Indians as the Secretary of the Interior may see fit to settle thereon". Title to this reservation, on which the Navajos and Hopis are intermingled, has been extensively litigated in a separate line of cases.[1]

Neither the 1868 treaty reservation nor the 1882 reservation is at issue here. The lands at issue are those withdrawn by other executive orders from 1880 to 1918.

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[1] **See Healing v. Jones**, 174 F.Supp. 211 (D.Ariz.1959); **Healing v. Jones**, supra, 210 F.Supp. 125; **Hamilton v. Nakai**, 453 F.2d 152 (9th Cir. 1972), **cert. denied** 406 U.S. 945, 92 S.Ct. 2044, 32 L.Ed.2d 332 (1972); **Hamilton v. MacDonald**, 503 F2d 1138 (9th Cir. 1974); **Sekaquaptewa v. MacDonald**, 544 F.2d 396 (9th Cir. 1976); **Sekaquaptewa v. MacDonald**, 575 F.2d 239 (9th Cir. 1978).

These lands became known as the Navajo reservation. Hereafter we refer to this area as "the Reservation". They surround the 1882 executive order reservation.[2]

A 1934 Act of Congress, 48 Stat. 960, defined the exterior boundaries of the Reservation. The Act provided, *inter alia*:

> All vacant, unreserved, and unappropriated public lands, including all temporary withdrawals of public lands in Arizona heretofore made for Indian purposes by Executive order or otherwise within the boundaries defined by this Act, are hereby permanently withdrawn from all forms of entry or disposal for the benefit of the Navajo and such other Indians as may already be located thereon; however, nothing herein contained shall affect the existing status of the Moqui (Hopi) Indian Reservation created by Executive order of December 16, 1882.

In 1974 Congress authorized both tribes to sue "for the purpose of determining the rights and interests of the tribes in and to [the lands covered by the 1934 Act] and quieting title thereto in the tribes". 25 U.S.C. § 640d-7 (hereafter "the 1974 jurisdictional act").

I—PROCEEDINGS BELOW

The Hopis filed this action. Their amended complaint requests: (1) a declaration that the Hopis have an undivided one-half interest in the lands at issue; (2) that jointly held lands be partitioned; and (3) that the

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[2] This land was involved in **Sekaquaptewa v. MacDonald**, 591 F.2d 1289 (9th Cir. 1979).

court order an accounting for all Navajo activities on all land in which the Hopis have an interest.

The district court limited the proceedings to a determination of the nature of the title conferred in the 1934 Act. Following discovery the parties filed cross motions for summary judgment. In a thorough opinion the district court held that it had jurisdiction of the first two claims but not of the accounting claim. It declared that the Hopi Tribe has an undivided one-half interest in all land it "possessed, occupied or used" in 1934. It declared further that the Navajo Tribe has (1) an undivided one-half interest in all reservation land "possessed, occupied or used" by the Hopis in 1934; and (2) exclusive trust title to the rest of the reservation. The district court took no action on the claim for partition, pending final resolution of title. It also did not identify specific lands "possessed, occupied or used" by the Hopis in 1934. We granted leave to appeal under 28 U.S.C. § 1292(b).

II—DISCUSSION

We must first address the broad question of what rights were conferred by the 1934 Act. Two subordinate issues must be settled to resolve the broader question:

(1) What parts of the Reservation were "vacant, unreserved, and unappropriated Public lands, including all temporary withdrawals of public lands in Arizona heretofore made by executive order"?

(2) What property interests are conferred by the phrase "for the benefit of the Navajo and such other Indians as may already be located thereon"?

Next, we must determine whether the 1974 jurisdictional act confers jurisdiction of the Hopi Tribe's claim for accounting.

A. *What Rights are Conferred by the 1934 Act?*

1. What lands are included in the phrase, "all vacant unreserved, and unappropriated . . . lands, including all temporary withdrawals?" Does the 1934 Act apply to all prior executive order withdrawals or only some of them?

The Navajos contend first that "including" means that "temporary withdrawals" are a subclass (or example) of "vacant, unreserved, and unappropriated" lands. The district court held that "including" meant "and". In the district court's view the 1934 Act withdrew: (a) vacant . . . lands, *and* (b) temporary withdrawals.

We agree with the district court. The primary purpose of the 1934 Act was to consolidate land ownership within the boundaries of the Reservation. Prior to 1934 neither tribe had recognized (compensable) title to areas withdrawn by executive order. To effectuate consolidated land ownership, the 1934 Act should be read to confirm land title to the greatest possible amount of land. The district court's conclusion is consistent with this.

The Navajos' suggestion that title was conferred only to "vacant" lands would have anomalous results. The district court's holding makes Hopi title hinge on possession, occupancy, or use. Hopi possession would preclude a finding of vacancy. The Hopis would have no title. Navajo title would be limited to lands vacant in 1934. We therefore reject this suggestion.

The Hopis contended that "temporary withdrawals" include all executive order withdrawals except the 1882 reservation exempted by the 1934 Act. The district court agreed, equating "temporary withdrawals" with executive order withdrawals. Its conclusion was based on the 1934 Act's purpose to consolidate reservation land ownership. It was necessary to confirm title in all executive order withdrawals since such withdrawals in themselves confer no recognized or compensable title. *See U.S. v. So. Pac. Transp. Co.*, 543 F.2d 676 (9th Cir. 1976).

The Navajos argue that "temporary" has acquired special meaning in United States Attorney General and Interior Department opinions which were based on dicta in a Supreme Court case, *U.S. v. Midwest Oil*, 236 U.S. 459, 35 S.Ct. 309, 59 L.Ed. 673 (1914). In the Navajos' view, executive order withdrawals made to preserve a *status quo* until Congress can act are "temporary", and executive order withdrawals made for public purposes where no legislative action is contemplated are "permanent".[3]

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[3] This distinction was approved by this court in **U.S. v. Consolidated Mines & Smelting Co., Ltd.**, 455 F.2d 432, 445 (9th Cir. 1971), but in reference to an executive order withdrawal. That case sheds no light on whether such a usage should be attributed to Congress, which is the question here.

The district court rejected this suggestion firmly. Its reasoning is persuasive. The overriding purpose of the 1934 Act repudiates the Navajos' interpretation. To consolidate reservation ownership it was necessary to change the status of reservation land title from a "tenancy at will to a permanent compensable interest". The proposed distinctions were developed by agency officials to justify executive withdrawals that would otherwise have conflicted with legislation. There is no reason to think that Congress approved this device or adopted this usage. If Congress had intended such a technical usage it might have said so clearly.

Finally, it is argued that "temporary withdrawals" must be construed not to apply to withdrawals made expressly for Navajos. The Navajos maintain that once lands are reserved for Indians, any subsequent grant purporting to affect those lands must be strictly construed. *Leavenworth, etc., R.R. Co. v. U.S.*, 92 U.S. 733, 746, 23 L.Ed. 634 (1876); *Mattz v. Arnett*, 412 U.S. 481, 93 S.Ct. 2245, 37 L.Ed.2d 92 (1973); *Seymour v. Superintendent*, 368 U.S. 351, 82 S.Ct. 424, 7 L.Ed.2d 346 (1962). The cited cases all involved assertions that Congress had withdrawn land from Indian reservation status, hence its status as "Indian country". See 18 U.S.C. § 1151. Among other things such a result would have terminated federal and tribal jurisdiction, both civil and criminal. 18 U.S.C. § 1151; *DeCoteau v. District County Court*, 420 U.S. 425, 427 n.2, 95 S.Ct. 1082, 1084 n.2, 43 L.Ed.2d 300 (1975). In view of these drastic results, a congressional intention to terminate is not to be inferred unless it is "expressed

on the face of the Act or . . . clear from the surrounding circumstances and legislative history." *Mattz v. Arnett, supra*, 412 U.S. at 505, 93 S.Ct. at 2258.

No intent to terminate need be shown here because there has been no termination. No one contends that the 1934 Act withdrew the Reservation from Indian country. The federal government's jurisdiction and trust obligations remain intact. *See, e.g.*, 25 U.S.C. § 631 *et seq.* Far from terminating prior executive order reservations, the 1934 Act reinforces them by recognizing and confirming Indian title.

Assuming an executive order could create an exclusive right of occupancy in one tribe versus another, it is important "to have in mind the circumstances in which the reservation was created". *Alaska Pacific Fisheries v. U.S.*, 248 U.S. 78, 87, 39 S.Ct. 40, 41, 63 L.Ed. 138 (1918). *See also U.S. v. Walker River Irr. Dist.*, 104 F.2d 334, 336 (9th Cir. 1939). Where two tribes have intermingled in the pattern shown here, we cannot blandly assume the executive has divested the indigenous tribe. The Navajos do not convincingly show that such was the executive's intent.

The Navajos next contend that the 1900 executive order withdrawal was ratified by a 1902 appropriations act, thereby recognizing Navajo title. A strict standard applies in determining whether legislation transfers or recognizes compensable title. *Tee-Hit-Ton Indians v. U.S.*, 348 U.S. 272, 278-79, 75 S.Ct. 313, 317, 99 L.Ed. 314 (1955) ("[T]here must be the definite intention by congressional action or authority to accord legal

rights, not merely p rmissive occupation"); *Hynes v. Grines Packing Co.*, 337 U.S. 86, 105, 69 S.Ct. 968, 980, 93 L.Ed. 1231 (1949) ("It would take specific and unambiguous legislation to cause us to rule that Congress intended to authorize the Secretary of the Interior to alienate . . . fisheries permanently").

The 1902 appropriation act makes no direct or indirect mention of title. The Navajos do not point to convincing legislative history to support their position.[4] We reject the Navajo argument. See *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 655-56, 96 S.Ct. 1793, 1796-97, 48 L.Ed.2d 274 (1976).

We conclude that the 1934 Act applies to all prior executive order withdrawals.

2. What property interests are conferred by the phrase "for the benefit of the Navajo and such other Indians as may already be located thereon"?

The Hopis contend that this provision vests undivided, one-half interests in both tribes. In their view, "as may already be located thereon" is merely a way of identifying the Hopis. It does not limit Hopi rights to land occupied. In real estate conveyancing parlance, they are "words of purchase".

The district court held that this language limits Hopi rights to lands "possessed, occupied or used" in

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[4] The Navajo position is based on evidence that President McKinley felt that it would be unjust to take the 1900 executive order lands without compensation. This says little of legislative intent to recognize exclusive Navajo title.

1934. The words "as may already be located thereon" are words of limitation. Under the district court's holding, the Navajos have: (1) an undivided one-half interest in lands occupied by the Hopis in 1934, and (2) exclusive trust title in all other reservation lands.

The 1934 Act is concerned primarily with Navajo affairs. The boundaries described are of "the Navajo Indian Reservation". The Act provides for the purchase of additional Navajo lands with Navajo funds. Navajos are precluded from receiving royalties from water developments on lands added to the Navajo reservation. Further allotments to Navajos are restricted. The Secretary is authorized to acquire private land for the Navajos. The State of Arizona is authorized to exchange school sections "within the boundary of the Navajo Reservation . . . in favor of said Indians". Funds are authorized to purchase the State's improvements on school sections if the State assigns its interest in the sections to the Navajos.

The only mention of the Hopis in the 1934 Act is in the provision excepting the 1882 reservation from the Act's effects. The Hopis' argument that the "plain meaning" of the 1934 Act vests equal title in both tribes is tenuous at best. They stress the word "all" in "All . . . lands . . . are . . . withdrawn . . . for the benefit of the Navajo and such other Indians as may already be located thereon." However, one must resort to extrinsic sources even to conclude that "such other Indians" includes the Hopis. The word "all" could be read to create undivided one-half interests in both tribes, but it does not do so unambiguously. Legislative history

makes it plain that "located thereon" cannot be read to convey to the Hopis a one-half interest in the Reservation. The district court's holding was based on a fair reading of the 1934 Act's legislative history. See 448 F.Supp. 1193-1196.

The Hopis suggest that real property conveyancing presumptions require that this language be construed to create a tenancy in common. Policies underlying conveyancing presumptions have no necessary application to federal-Indian relations.[5] The intent of Congress, which we read to conflict with the conveyancing presumptions, governs. We therefore reject this suggestion.

The Hopis also suggest this result is inconsistent with *Healing v. Jones, supra*, 210 F.Supp. 125. In *Healing* a 1958 statute withdrew the lands described in the 1882 executive order. The 1958 statute withdrew lands "for the Hopi Indians and such other Indians, if any, as heretofore have been settled thereon by the Secretary of the Interior pursuant to such Executive order". The 1882 executive order used similar words: "for the use and occupancy of the Moqui (Hopi), and such other Indians as the Secretary of the Interior may see fit to settle thereon." The *Healing* court held that the

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[5] In **U.S. v. Washington**, 520 F.2d 676, 685 (9th Cir.) **cert. denied**, 423 U.S. 1086, 96 S.Ct. 877, 47 L.Ed.2d 97 (1976), **aff'g**, 384 F.Supp. 312 (W.D.Wash.1974), this court drew by analogy on cotenancy principles to adjust competing Indian and non-Indian claims to fisheries. However, this was only after the rights to the fisheries were determined pursuant to principles of treaty interpretation. The cotenancy analogy was used in aid of partition, after trial was determined.

If we were to apply real property principles to this case, the more accurate analogy might be to a class gift. **See Restatement of Property**, § 300 (and see Comment f), and § 367, Comment e (1940 ed.).

1882 order created a Hopi right of occupancy to the entire area, regardless of where they settled. The Navajos subsequently acquired an equal right to occupy lands on which they were administratively settled. In areas where there was no Navajo settlement, the 1958 Act confirmed exclusive Hopi trust title.

The Hopis contend that the district court's ruling here is in effect the same as the ruling in *Healing*: the named tribe receives an interest in all lands, while the "other Indians" have a one-half interest in land occupied. Yet the statute and order in *Healing* are different from the 1934 Act at issue here. In *Healing* "other Indians'" rights were contingent on administrative action. In this case no such action was required. The 1934 Act immediately vested rights in both tribes. Therefore, the Hopis argue, equivalent results in the two cases must be error.

Even if the district court's holding were inconsistent with *Healing*, legislative intent behind the 1934 Act must control. But there is no inconsistency. The statute and order in *Healing* used different language in a different legislative setting than the 1934 Act. The fact that the two cases arrived at superficially similar results should not in itself give pause. The single factor present in *Healing* and not here was the initial withdrawal of all land in favor of the named tribe. In *Healing* the "other Indians" obtained an interest in reservation lands only after obtaining secretarial authorization to settle. The Hopis seem to suggest that this *Healing* method is the only way for Congress to authorize the result the

district court reached. Congressional power over Indian land is broad. *Warren Trading Post v. State Tax Commission*, 380 U.S. 685, 85 S.Ct. 1242, 14 L.Ed.2d 165 (1965); *U.S. v. Sandoval*, 231 U.S. 28, 34 S.Ct. 1, 58 L.Ed. 107 (1913). We cannot restrict Congress in the way the Hopis suggest. Congressional intent is inconsistent with the Hopis' claim to entitlement to a one-half interest in the reservation. We must respect that intent.

Finally, the Hopis argue that the issue of title is a political question. Congress did not identify Navajo-Hopi boundaries in the 1934 Act. The Hopis would not agree to boundaries proposed by the administration, and Congress was unwilling to force the issue. The Hopis lobbied to protect what they thought was theirs. This resulted in the exemption of the 1882 reservation from the 1934 Act and the "such other Indians" language. The question is what inferences can be drawn from this. The Hopis suggest that: (1) since Congress refused to draw a Navajo-Hopi boundary, it is improper (as a political judgment) for the court to impose limitations on Hopi property interests; and therefore (2) the 1934 Act must be read as creating a cotenancy. The Navajos suggest that Congress specifically limited Hopi rights by the "such other Indians as may already be located thereon" provision.

Whether the title question is political depends on whether there is "a lack of judicially discoverable and manageable standards for resolving it"; or whether the question is impossible to decide "without an initial policy

determination of a kind clearly for nonjudicial discretion". *Baker v. Carr*, 369 U.S. 186, 217, 82 S.Ct. 691, 710, 7 L.Ed.2d 663 (1962). *See also Healing v. Jones, supra*, 174 F.Supp. at 216 ("[I]f the identification of the holders of such title and extent and nature of the respective rights and interests of each cannot be fixed without exercising, or reviewing the exercise of, political judgment, then the judicial power is not constitutionally invoked.").

If we agreed that there were insufficient standards to determine title, it does not follow, as the Hopis maintain, that we must declare the tribes cotenants. It would be more logical for us to dismiss the case for lack of jurisdiction of the political question.

We do not agree, however, that there are no judicially ascertainable standards governing this question. We acknowledge the absence of a Navajo-Hopi boundary, as we must. We do not concede that the question of Navajo and Hopi property interests was left open. It is a mistake to assume that the absence of a boundary negates standards for determining title. The purposes, history, and language of the 1934 Act show an intent to withdraw all reservation land for the Navajos except for pockets occupied by Hopis. We agree with the district court that this is the meaning of the "such other Indians as may already be located thereon" provision. The legislative history discussed by the district court at 448 F.Supp. 1194-96, supports this conclusion.

Congress was not inflexibly committed to the notion of exclusive areas for the two tribes. It preferred to

allow the tribes to work out whatever cooperative arrangement they could. But when negotiations failed, the 1974 jurisdictional act authorized the courts to declare boundaries if one of the tribes so requested. Since its jurisdiction was invoked for this purpose, the district court properly looked to the legislative history of the 1934 Act to determine the tribes' interests.

To be sure, Congress did not specify in metes and bounds the extent of tribal property interests in the withdrawn property. Nevertheless, legislative intent is clear enough to enable us to identify Hopi interests by areas settled. Navajo interests are identifiable as the residue. Congress recognized Hopi concern over the 1882 reservation and their villages, shrines, and grazing areas outside the 1882 reservation. The "such other Indians" provision was explained to the Hopis as protecting their rights to areas occupied outside the 1882 reservation. There is no indication that anyone contemplated joint title to the entire area involved here. In this context the Hopis' assertion of joint title must be rejected.

The district court held that the Hopis' interest in land they were occupying in 1934 was limited to an undivided one-half interest. In effect the district court held that because the 1934 Act did not establish boundaries for exclusive Hopi lands, each tribe must have an undivided one-half interest. We have rejected this approach in determining the question of title. We must draw on legislative history to find standards for determining title.

Looking to legislative history, a stronger case can be made that Hopi interests are exclusive rather than joint. The Act was not intended to disturb then-existing land tenure patterns. Hopi villagers were told the Act would "protect the rights of the Hopi Indians to the lands they occupy around here and there is absolutely no chance of the Hopis' rights to these lands being disturbed." Ex.H. 143, at 766. It is true that the phrase "the Hopis' rights to these lands" is ambiguous. Technically speaking, neither the Hopis nor the Navajos could have had any clear idea what those rights might be. But in their natural and untechnical sense these words are not ambiguous. They say rather clearly that the 1934 Act would not disturb the Hopis' right to occupy the land they were then occupying. This is consistent with the intent of the 1934 Act to preserve a *status quo* and not to disturb existing arrangements. We therefore reverse the judgment insofar as it limits Hopi interests to an undivided one-half interest in lands they exclusively possessed, occupied, or used in 1934. Judgment should be entered declaring Hopi interests in those lands to be exclusive.

B. *Does the Court Have Jurisdiction of the Hopi Claim For An Accounting?*

The Hopis claim that jurisdiction of the claim for an accounting is conferred expressly and impliedly by the 1974 jurisdictional act. They contend that express authority is provided by 25 U.S.C. § 640d-17(c):

> Either tribe may institute such further original, ancillary, or supplementary actions against the

> other tribe as may be necessary or desirable to insure the quiet and peaceful enjoyment of the reservation lands . . ., and to fully accomplish all objects and purposes of sections 640d to 640d-24 of this title.

They also contend that an accounting is an integral aspect of an action for partition. Therefore 25 U.S.C. § 640d-7(b), authorizing partition of jointly held lands, impliedly authorizes an accounting.

The district court rejected these contentions. See 448 F.Supp. 1183. Its conclusion was correct. Federal courts' jurisdiction being limited, the burden was on the Hopis to establish jurisdiction. The United States and Indian tribes such as the Navajos possess coextensive sovereign immunity. Tribes may be sued only with the consent of Congress. *Hamilton v. Nakai*, 453 F.2d 152, 158 (9th Cir. 1972). When Congress consents to suit, it may impose limitations. Limitations must be "strictly observed and exceptions thereto are not to be implied". *Id.* at 159 (quoting from *Soriano v. U.S.*, 352 U.S. 270, 276, 77 S.Ct. 269, 273, 1 L.Ed.2d 306 (1957). Therefore the Hopis have a heavy burden to establish jurisdiction.[6]

Section 640d-17(c) does not mention claims for accounting. There is therefore no express grant of jurisdiction of accounting claims in section 640d-17(c).

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[6] The Hopis' characterization of the 1974 jurisdictional act as "remedial legislation" is unconvincing. The 1974 Act was intended to settle a title controversy between two quasi-sovereign Indian tribes. The Act does not create a private remedy for wrongs. Compare **Tcherepnin v. Knight**, 389 U.S. 332, 88 S.Ct. 548, 19 L.Ed.2d 564 (1967) (private remedy under securities acts).

Nor do we see a sound basis for an implied jurisdictional grant. The 1974 jurisdictional act provides different procedures and remedies for the 1882 executive order reservation and for the surrounding reservation confirmed by the 1934 Act. The 1974 Act specifically provides for accountings and damages claims for lands within the 1882 reservation. 25 U.S.C. § 640d-17(a). The absence of similar provisions for the 1934 Act's lands is telling.[7] The district court gave a likely explanation for the omission. Without a prior adjudication of title, Congress could not know what kind of financial burden an accounting would impose and on which tribe. If the Hopis were entitled to one-half of the Navajo reservation, for instance, an accounting might break the Navajo bank. It is therefore likely that Congress purposefully did not authorize an accounting claim. We cannot infer one.

The Hopis contend that the legislative history of the 1974 jurisdictional act shows that an accounting was intended. We disagree. The legislative history shows only a desire for a final settlement of all title claims. This history might support an inference that an accounting was intended. But any inference is weak at best

[7] The Hopis offer an obscure explanation for this omission. They contend that an accounting and damages are authorized for the 1882 reservation lands because title to those lands had already been adjudicated (in **Healing v. Jones, supra,** 210 F.Supp. 125) when Congress passed the 1974 jurisdictional act. It was therefore possible for Congress to spell out the details of the final settlement of the 1882 title claims. In contrast, title to the 1934 Act reservation is still uncertain. Congress could not spell out the "details" of a final settlement because of this uncertainty.

This argument is strained. There is no convincing reason to believe that uncertainty over title caused Congress to provide for an accounting only impliedly. The same uncertainty did not prevent Congress from specifically allowing for partition.

and cannot sustain the Hopi burden of establishing jurisdiction.

Similarly unconvincing is the Hopi contention that an accounting is merely an inherent aspect of judicial partition. The authorities they cite support such a position, but only with respect to private adjudications. None involve Indian tribes possessing attributes of sovereignty. None involve a federal statute establishing detailed processes and standards for quieting title, partition, and accountings in limited circumstances. We must strictly observe the limitations Congress has established.

The 1974 jurisdictional act, 25 U.S.C. § 640d-7, authorizes actions to quiet title and to partition lands in some circumstances. Section 640d-17(c) authorizes "further original, ancillary or supplementary actions" only if they insure "the quiet and peaceful enjoyment of the reservation lands" or to accomplish the "objects" of the Act. It is not at all clear that an action for accounting would insure quiet and peaceful enjoyment of reservation lands. The effect might be the opposite. The "objects" of the 1974 jurisdictional act with respect to the 1934 Act lands are spelled out in section 640d-7. Those objects are to quiet title and to partition certain lands. An action for accounting serves neither purpose.

III—CONCLUSION

We remand to the district court to determine what land the Hopis "possessed, occupied, or used" in 1934. In doing so, we acknowledge the possibility that some reservation land, grazing land for instance, may have been used by both tribes in 1934. Even in villages it

may not be possible for the court to conclude that the Hopis "possessed, occupied, or used" such land exclusively. In that event it may be proper on remand for the district court to declare title to be joint or undivided, subject to partition. We reverse only with respect to the district court's holding that Hopi title is necessarily non-exclusive, even with respect to land that was actually and exclusively "possessed, occupied, or used" in 1934.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

[448 F.Supp. 1183]

Abbott SEKAQUAPTEWA, Chairman of the Hopi Tribal Council of the Hopi Indian Tribe, for and on behalf of the Hopi Indian Tribe and all villages, clans, and Individual members of the Hopi Tribe, Plaintiff,

v.

Peter MacDONALD, Chairman of the Navajo Tribal Council of the Navajo Indian Tribe, for and on behalf of the Navajo Indian Tribe and all villages, clans, and Individual members of the Navajo Tribe, Defendant.

No. Civ. 74-842 Pct. WPC.

United States District Court,
D. Arizona.

Filed: April 5, 1978.

MEMORANDUM AND ORDER

COPPLE, District Judge.

Pursuant to 25 U.S.C. § 640d-7, the Hopi tribal chairman commenced an action in this district to determine the Hopi tribal rights and interests in the area described by the Act of June 14, 1934, 48 Stat. 960 (1934 Act). The 1934 Act describes the exterior boundaries of the Navajo Reservation in northeastern Arizona, and conveys an equitable interest in certain of these lands to the Navajo and "such other Indians as

may already be located thereon." Before passage of the 1934 boundary bill, this area consisted of a patchwork of treaty, legislative, and executive order reservations.[1] The Hopi and Navajo tribes stipulate to the admission of the following map to illustrate the area. [Map omitted. *See* 448 F.Supp. at 1185.]

Events surrounding the 1882 rectangle, although not directly related to this case, form the backdrop of this suit. The 1882 parcel was withdrawn by Executive Order of December 16, 1882, for the benefit of the Hopi tribe and "such other Indians as the Secretary of the Interior may see fit to settle thereon." The 1934 Act does not affect the status of the 1882 Reservation, which is the subject of continuing litigation in another court within this district. *See Healing v. Jones*, 210 F.Supp. 125 (D.Ariz. 1962), *aff'd*, 373 U.S. 758, 83 S.Ct. 1559, 10 L.Ed.2d 703 (1963). *Healing* documents both the bitter antagonism between the Navajo and the Hopi and the difficulties attending a judicial resolution of Navajo-Hopi land controversies. *See Hamilton v. MacDonald*, 503 F.2d 1138 (9th Cir. 1974).

This action is now before the Court upon the Navajos' motion to dismiss certain allegations in the

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[1] The 1868 rectangle was made a part of the Navajo Reservation by treaty. Treaty with the Navajos, June 1, 1868, 15 Stat. 667. By executive order, other parcels were set apart as additions to the Navajo Reservation or for Indian purposes. **See, e.g.,** Exec. Order of Oct. 29, 1878; Exec. Order of Jan. 6, 1880; Exec. Order of May 17, 1884; Exec. Order of Jan. 8, 1900. Congress added lands to the Western Navajo Indian Reservation, and created the Canyon de Chelly National Monument. Act of May 23, 1930, 46 Stat. 378; Act of Feb. 14, 1931, 46 Stat. 1161 (codified at 16 U.S.C. §§ 445 to 445b).

amended complaint,[2] and on cross-motions for partial summary judgment regarding the meaning of the 1934 Act.[3] These motions raise questions of subject matter

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[2] Plaintiff's motion to file an amended complaint was granted in August 1977 without reaching the merits of the Navajo opposition. The defendant has not reintroduced these objections by a motion to dismiss. However, insofar as the Navajos' objections to the amended complaint rest upon jurisdictional grounds, the Court wil consider these issues sua sponte.

[3] Both tribes have collected and filed volumes of documents to bolster their interpretation of the 1934 Act (hereinafter cited as Navajo Ex., Hopi Ex.). These documents actually shed little light upon the meaning of the 1934 land grant. Nonetheless, both tribes have objected to the admission of certain evidence.

On a motion for summary judgment, a district court "can consider any material that would be admissible or usable at trial." C. Wright & A. Miller, Fed.Prac. and Pro.: Civil §§ 2721, 2722; 6 Moore's Fed.Prac. ¶ 56.11 [1.-8]. Of course, Rule 56 does not relieve counsel from laying a proper evidentiary foundation. **United States v. Dibble**, 429 F.2d 598 (9th Cir. 1970). For example, the Court cannot consider witness interviews presented by the Hopi tribe because they are not properly authenticated. **See** Hopi Ex. 233, 234, 235 and 236. The major objections of the tribes presented raise issues of relevancy. Statutory construction often requires a district court to explore "the circumstances under which the statute passed, the mischief at which it was aimed, and the object it was supposed to achieve." C. Sands, Statutes and Statutory Construction § 48.03 (4th ed. 1972). Therefore, historical material bearing upon the Hopi-Navajo land disputes are relevant to this motion. Moreover, these historical documents fall within an exception to the hearsay rule. Fed.R.Evid. 803(16). However, statements made by Indian representatives or administrative officials which are not contemporaneous with the passage of the 1934 Act fall into a different category. **See Healing v. Jones**, 210 F.Supp. 125, 142-43 (D.Ariz. 1962), **aff'd**, 373 U.S. 758, 83 S.Ct. 1559, 10 L.Ed.2d 703 (1963). The 1934 land grant was applicable to the particular situation then existing, and subsequent events or interpretations cannot diminish or enlarge the effect of the 1934 Act. **Cf.** C. Sands, **supra** § 49.02. The Court will therefore not consider evidence regarding events long after passage of the 1934 Act. **See, e. g.,** Hopi Ex. 227 to 293.

Beyond these general comments, the Court need not embark on the time-consuming task of ruling on each of the over 100 exhibits objected to. The admissibiity of the bulk of the documents is stipuated to. The Court will explicitly cite which documents among these that are relied upon in the text. For purposes of appeal, the Court adds that even assuming all the proffered exhibits are admitted, the Court's conclusions would not differ.

jurisdiction and collateral estoppel, and three overlapping issues as to the construction of the 1934 Act: (1) what property was granted by the 1934 Act, (2) who are the holders of the vested equitable interests in the 1934 Act lands, and (3) what is the nature and extent of their respective holdings.[4] Each question will be discussed seriatim.

A. *Subject Matter Jurisdiction*

The original complaint, brought by the tribal chairman on behalf of the Hopi tribe, simply requests a declaration of Hopi rights in the area described by the 1934 Act. *See* 25 U.S.C. § 640d-7(a). The amended complaint differs in three ways. First, the amended complaint alleges a broader representional capacity for the tribal chairman. The chairman is now representative of the tribe, villages, clans, and individual members of the tribe. Next, a second claim for relief requests a partition of lands the Court may find jointly held by the Navajo and Hopi. Finally, a third claim for relief asks for an accounting for all Navajo activities on land found to be exclusively or jointly held by the Hopi tribe. The Navajos argue that the amended complaint exceeds the subject matter jurisdiction conferred on the Court. 25 U.S.C. §§ 640d to 640d-20.

The statute granting federal jurisdiction over the Hopi-Navajo land dispute within the 1882 Reservation authorized the tribal chairman to represent both tribe,

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[4] An understanding of these issues is aided by a general knowledge of the nature of tribal property rights. **See generally** F. Cohen, Handbook of Federal Indian Law 287-312 (N.Mex.ed. 1942).

villages, clans, and individual Indians. Act of July 22, 1958, Pub. L. No. 85-547, 72 Stat. 403; *see Healing v. Jones*, 174 F.Supp. 211 (D.Ariz.1959). The jurisdictional statute for this dispute is narrower in representational terms. 25 U.S.C. § 640d-7(a) ("Either tribe, acting through the chairman of its tribal council for and on behalf of the tribe . . ."). Nonetheless, other sections of the jurisdictional statute assume a broad representational capacity. Section 640d-7(b) orders the Court to determine any lands in which the Hopi tribe, including villages, clans, and individuals, have an exclusive interest. Section 640d-17(c) authorizes supplemental actions on behalf of the tribe, villages, clans, and individual members. Construing the jurisdictional statute as a whole, the Court concludes that the alleged representational capacity is proper.

Section 640d-7(b) affirmatively requires the district court to partition any lands found to be jointly held by the Navajo and Hopi. The Court plainly has jurisdiction over the Hopi second claim for relief. The third claim for an accounting is more troublesome. Section 640d-17(c) allows supplemental actions "as may be necessary or desirable to insure the quiet and peaceful enjoyment of the reservation lands of the tribes . . . and to fully accomplish all objects and purposes of sections 640d to 640d-24." The Hopi tribe argues this section allows an action for an accounting. However, section 640d-17(c) merely codifies the equitable jurisdiction of a federal court to issue ancillary bills to effectuate a court decree. *See Hamilton v. Nakai*, 453 F.2d 152, 157 (9th Cir. 1972), *cert. denied*, 406 U.S. 945,

92 S.Ct. 2044, 32 L.Ed.2d 332 (1972). An action for an accounting is not necessary to effectuate any decree this Court might make, or "to insure the quiet and peaceable enjoyment of the reservation lands." Moreover, the legislative directive to accomplish all purposes of the title does not detract from "the principle that the power of a court to afford a remedy must be coextensive with its jurisdiction over the subject matter." *Id.* at 156. Section 640d-7 grants the Court jurisdiction to quiet title and partition jointly held land. Damages is not the object or purpose of the jurisdictional grant. Furthermore, Congress explicitly authorized an action for an accounting in supplemental proceedings in *Healing*. *See* 25 U.S.C. § 640d-17(a). Congressional silence presumably bars such a remedy in this action. Indeed, it is unlikely Congress would allow a damage remedy without first ascertaining the extent and nature of the Hopi interest in the 1934 Act lands. Otherwise, if a district court ruled the Hopi tribe has an undivided one-half interest in all the 1934 Act lands, then a concomitant damage remedy probably would obliterate the Navajo treasury. Therefore, the third claim for relief will be dismissed.

B. *Collateral Estoppel*

In 1951 the Hopi tribe brought an action against the United States before the Indian Claims Commission alleging the government occupied and possessed without compensation the tribe's aboriginal land. *See* 25 U.S.C. §§ 70 to 70v. "Aboriginal title" depends upon a factual determination. "[A]boriginal title must rest on actual, exclusive, and continuous use and occupancy 'for

a long time' prior to the loss of the property." *Sac & Fox Tribe v. United States*, 161 Ct.Cl. 189, 315 F.2d 896, 903 (1963), *cert. denied*, 375 U.S. 921, 84 S.Ct. 266, 11 L.Ed.2d 165 (1963); *see also Strong v. United States*, 207 Ct.Cl. 254, 518 F.2d 556, 560 (1975), *cert. denied*, 423 U.S. 1015, 96 S.Ct. 448, 46 L.Ed.2d 386 (1975); F. Cohen, Handbook of Federal Indian Law 291-94 (N.Mex. ed. 1942). The Hopi tribe asserted an aboriginal title claim extending approximately over three-quarters of the 1934 Act lands. The Hopi action was consolidated with a petition filed by the Navajo tribe also alleging the uncompensated taking of Navajo aboriginal land.

The Indian Claims Commission denied the Hopi tribe's aboriginal title claim to all of the territory alleged. Rather, the Commission held the Hopi tribe possessed aboriginal title to a smaller area which included the 1882 Reservation. This title was extinguished without compensation as to all lands outside the 1882 Reservation when the Executive Order of December 16, 1882 issued. The Hopis' aboriginal title to land within the 1882 Reservation was extinguished partially in 1937 when the Navajo tribe was administratively settled within the area. *See Healing v. Jones*, 210 F.Supp. 125 (D.Ariz.1962), *aff'd*, 373 U.S. 758, 83 S.Ct. 1559, 10 L.Ed.2d 703 (1963). The Commission ordered the case to proceed to a determination of damages. *See Hopi Tribe v. United States*, 31 Ind.Cl.Comm. 16 (1973); *Hopi Tribe v. United States*, 23 Ind.Cl.Comm. 277 (1970).

The defendant claims this decision collaterally bars

the Hopi tribe from asserting title to the lands litigated before the Indian Claims Commission. However, in this action the Hopi tribe seeks to quiet title to land under the doctrine of "recognized title." Recognized title differs from aboriginal title.

> Where Congress has by treaty or statute conferred upon the Indians or acknowledged in the Indians the right to permanently occupy and use land, then the Indians have a right or title to that land which has been variously referred to in court decisions as "treaty title", "reservation title", and "acknowledged title." As noted by the Commission, there exists no one particular form for such Congressional recognition or acknowledgement of a tribe's right to occupy permanently land and that right may be established in a variety of ways.

Miami Tribe v. United States, 146 Ct.Cl. 421, 175 F.Supp. 926, 936 (1959). "The significance of the recognized title doctrine generally lies in the fact that a plaintiff successful on this issue need not present proof demonstrating aboriginal use and occupancy." *Strong v. United States, supra* at 563; F.Cohen, *supra* at 291-99. Therefore, the issues of fact and law before the Indian Claims Commission have no bearing whatsoever to this action. It is axiomatic that collateral estoppel does not apply to unlitigated and undetermined issues. 1b Moore's Fed. Prac. ¶0.443[1].

Nonetheless, the Navajo tribe argues that issues pertaining to the 1934 Act were decided on appeal to the Court of Claims adversely to the Hopi. The Hopi brief to the Court of Claims indicates the contrary,

however.[5] The Hopi tribe argued that aboriginal title in certain lands outside the 1882 Reservation continued until 1934. The 1934 Act extinguished one-half of the Hopi interest in this territory. Hopi argument was not persuasive to the Court of Claims, who affirmed by memorandum decision the judgment of the Indian Claims Commission.[6] By necessarily concluding that Hopi aboriginal title outside the 1882 Reservation was extinguished in 1882, the Court of Claims never reached any issues concerning the 1934 Act. Collateral estoppel is inappropriate as to issues which were neither essential nor necessary to judgment. *Id.* Therefore, the Hopi tribe is not collaterally estopped in any respect from asserting property rights under the 1934 Act.

C. *What Property Was Granted by the 1934 Act*

The relevant granting clause of the 1934 Act follows:

> . . . . That the exterior boundaries of the Navajo Indian Reservation, in Arizona, be, and they are hereby, defined as follows . . . [boundary description]. *All vacant, unreserved, and unappropriated public lands, including all temporary withdrawals of public lands in Arizona heretofore made for Indian purposes by Executive order or otherwise within the boundaries defined by this Act,* are hereby permanently withdrawn from all forms of entry or disposal for the benefit of the Navajo and such other Indians as may

[5] **The brief is reproduced at Navajo Ex. E, Appendix to Navajo Motion for Partial Summary Judgment, Sekaquaptewa v. MacDonald, Civ. 74-842, Docket No. 44 (April 26, 1977).**

[6] **The memorandum decision is reproduced at Exhibit G, Appendix to Navajo Motion for Partial Summary Judgment, Sekaquaptewa v. MacDonald, Civ. 74-842, Docket No. 44 (April 26, 1977).**

> already be located thereon; however, nothing herein contained shall affect the existing status of the Moqui (Hopi) Indian Reservation created by Executive order of December 16, 1882.

(emphasis added). Which lands were "vacant, unreserved, and unappropriated" is a question of fact not before the Court on this motion. The parties dispute which of the lands withdrawn by executive order in 1878, 1880, 1884, 1900, 1901, 1907, and 1918 were "temporary withdrawals of public lands in Arizona."

The Hopis argue that all executive order withdrawals of public land prior to June 1934 were "temporary." An executive order reservation grants an Indian tribe only a "mere temporary and cancellable possessory right." *Ute Indians v. United States,* 330 U.S. 169, 178, 67 S.Ct. 650, 654, 91 S.Ct. 823 (1947). While occupying an executive order reservation, Indians are no more than tenants at the will of the government.

> . . . the status of executive order reservations can be summarized as follows: the Indians have the exclusive right to possession but title to the lands remains with the United States. Congress has plenary authority to control use, grant adverse interests or extinguish the Indian title. In these respects, executive order reservations do not differ from treaty or statutory reservations. The one difference is that so long as Congress has not recognized compensable interests in the Indians, executive order reservations may be terminated by Congress or the Executive without payment of compensation.

United States v. Southern Pacific Transportation Co., 543 F.2d 676, 687 (9th Cir 1976). The Court

agrees that a "temporary withdrawal" under the 1934 Act refers to the unique status of an executive order reservation as opposed to legislatively conferred, compensable "recognized title." [7]

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[7] The Navajo tribe attempts to distinguish temporary from permanent withdrawals in a more abstract manner. The argument begins with **United States v. Midwest Oil Co.**, 236 U.S. 459, 35 S.Ct. 309, 59 L.Ed. 673 (1915). In **Midwest Oil**, the Court held that the President had the power to withdraw public lands from potential mining claims pending further legislation. The Court found that Congress had granted this power to the Executive by a history of long acquiescence. The **Midwest Oil** Court rejected a distinction between temporary and permanent executive land withdrawals offered by the appellees.

> The appellees, however, argue that the practice thus approved [by Congress in the past], related to reservations,—to cases where the land had been reserved for military or other special public purposes,—and they contend that even if the President could reserve land for a public purpose or for naval uses, it does not follow that he can withdraw land in aid of legislation. When analyzed, this proposition, in effect seeks to make a distinction between a reservation and a withdrawal,—between a reservation for a purpose not provided for by existing legislation, and a withdrawal made in aid of future legislation. It would mean that a permanent reservation for a purpose designated by the President, but not provided for by statute, would be valid, while a merely temporary withdrawal to enable Congress to legislate in the public interest would be invalid. It is only necessary to point out that, as the greater includes the less, the power to make permanent reservations includes power to make temporary withdrawals. For there is no distinction in principle between the two. The character of the power exerted is the same in both cases. In both, the order is made to serve the public interest, and in both the effect on the intending settler or miner is the same.

Id. at 475-76, 35 S.Ct. at 314. Congress has since eliminated any implied Executive withdrawal power. Fed. Land Policy and Management Act of 1976, Pub. L. No. 94-579 § 704(a), 90 Stat. 2743.

Midwest Oil concerned a controversy which arose before passage of the Picket Act in 1910. Act of June 25, 1910, 36 Stat. 847 (codified at 43 U.S.C. §§ 141 to 143), **repealed** Fed. Land Policy and Management Act of 1976, Pub. L. No. 94-579 § 704(a), 90 Stat. 2743. The Pickett Act expressly authorized the President to "**temporarily withdraw** from settlement, lo-

[7] **Continued—**

cation, sale, or entry any of the public lands . . . and reserve the same for . . . public purposes to be specified in the orders of withdrawals." 43 U.S.C. § 141 (emphasis added). Lands withdrawn under the Pickett Act remained open to "exploration, discovery, occupation, and purchase under the mining laws." **Id.** § 142. After passage of the Pickett Act, the question arose whether the President could withdraw lands so that they would not be subject to the mining laws. Then Attorney General Robert Jackson argued that the President could withdraw lands which were not subject to mining claims. 40 Op. Att'y Gen. 73 (1941). Jackson reasoned that the Pickett Act legislated only as to temporary withdrawals, and did not touch permanent executive order withdrawals.

> It is desirable to point out preliminarily that there is a recognized difference between the two kinds of withdrawals. It is true the Supreme Court stated in the **Midwest** case . . . that there was no distinction in principle between a permanent reservation and a temporary withdrawal. But it seems clear the Court was referring to the question of power, not to types of withdrawal. The Court referred to differing factual situations in which one type is used and not the other. Thus it gave instances of withdrawals in aid of legislation (pp. 476-80 [35 S.Ct. 309]), and of withdrawals for reservations for public uses (pp. 470-1 [35 S.Ct. 309]), the latter including withdrawals for the establishment of bird refuges, enlargement of Indian or military reservations, the setting aside of land for water, timber, fuel, hay, signal stations, and target ranges.

Id. at 76. Exploring the legislative history of the Pickett Act Jackson concluded:

> When lands are withdrawn temporarily for a purpose coming within the 1910 Act, those lands are subject to the terms of that act and accordingly said mining laws apply. If, however, the lands are not withdrawn temporarily for a purpose within the 1910 Act, but for permanent use by the Government for other and authorized uses, the mining laws made applicable to lands withdrawn under the 1910 Act do not apply . . . . **This is so notwithstanding the withdrawal now contemplated and any other permanent withdrawal may be temporary in the very broad sense that they may be subsequently revoked by the President or by Congress.**

Id. at 81 (emphasis added). Apparently, the Jackson view is accepted in this circuit.

> Thus "temporary" and "permanent" do not have meanings in terms of time. Rather they are words which go to the nature of the withdrawal. A withdrawal of lands and their reservation for a present use rendered necessary for the discharge of the responsibilities vested in

[7] **Continued—**

> the Executive branch of the Government is said to be permanent. These reservations have been made for such purposes as post offices, military and Indian reservations, light houses, and the like. A withdrawal of lands for a public purpose, as distinguished from use, is said to be temporary.

J. Lowe, **Withdrawals and Similar Matters Affecting Public Lands,** 4 Rocky Mt.Min.L.Inst. 55, 62 (1958), **cited approvingly, United States v. Consolidated Mines & Smelting Co., Ltd.,** 455 F.2d 432, 444-45 (9th Cir. 1971).

The Jackson distinction between temporary and permanent withdrawals was echoed by Felix Cohen, acting solicitor to the Department of the Interior, in a memorandum on the "Validity of Orders Temporarily Withdrawing Public Land in Aid of Legislation Looking to the Establishment of Indian Reservations."

> . . . when the word "temporary" is used with respect to withdrawals in aid of legislation, the word "temporary" is used in contra-distinction to the word "permanent." The executive practice upheld in the **Midwest Oil Co.** case embraced two types of public land withdrawals—permanent withdrawals intended to be effective immediately for the purposes for which the lands were withdrawn, and temporary withdrawals such as those now under consideration, in which public land was withdrawn for the purpose of maintaining the status of the land free of private claims until such time as the Congress itself had taken action.

60 I.D. 54, 56-57 (1947). On the basis of these distinctions, the Navajo tribe argues that certain executive order withdrawals within the 1934 Act boundaries were permanent ones, and, therefore, not granted by the 1934 Act. For example, the Executive Order of October 29, 1878, states:

> It is hereby ordered that the tract of country in the Territory of Arizona lying within the following described boundaries . . . be, and the same hereby is, withdrawn from sale and settlement and set apart as an addition to the present reservation for the Navajo Indians.

The Navajo tribe characterizes this executive order withdrawal as a withdrawal for immediate present use, and, therefore, a "permanent" withdrawal.

The Court is not persuaded that the Jackson distinction is a meaningful one to apply to the 1934 Act. After all, the distinction arose from an Executive attempt to justify land withdrawals seemingly at odds with legislative directives. The 1934 Act states that "All . . . temporary withdrawals of public lands in Arizona heretofore made for Indian purposes by Executive order . . . are hereby permanently withdrawn . . . ." Considering the juxtaposition of "temporary" and "permanent" within the 1934 Act, it is reasonable to assume Congress in-

The Navajo tribe argues that certain executive order withdrawals still fall outside the 1934 Act. The tribe reasons that Congress recognized title in the Navajo to some areas within the 1934 boundary bill before its passage. For example, an Appropriations Act of May 27, 1902, 32 Stat. 264, recognized a Navajo compensable interest in the area withdrawn by the Executive Order of Jan. 8, 1900. The Act of March 3, 1927, 44 Stat. 1347 (codified at 25 U.S.C. § 398d), which froze the boundaries of all executive order reservations, recognized Navajo title in other executive order reservations within the 1934 Act boundaries.

The issue raised is whether Congress recognized rights of permanent occupancy before the 1934 Act?

> An Indian Reservation created by Executive Order of the President conveys no right of use or occupancy to the beneficiaries beyond the pleasure of Congress or the President. Such rights may be terminated by the unilateral action of the United States without legal liability for compensation in any form even though Congress has permitted suit on the claim. . . . When a reservation is established by a treaty ratified by the Senate or a statute, the quality of the rights thereby secured to the occupants of the reservation depends upon the language or purpose of

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[7] **Continued—**
tended to change the Indian land status from a tenancy at will to a permanent compensable interest. Although the legislative history of the 1934 Act is silent as to this question of construction, there is no indication whatsoever that any of the prior executive order withdrawals were excluded from the 1934 grant. If Congress intended to legislate as to one type of withdrawal and not to the other, the Court would expect some expression of this purpose. Therefore, the Court will not apply the Jackson distinction between permanent and temporary executive order withdrawals.

> the Congressional action. Since Congress, under the Constitution, § 3 of Art. IV, has the power to dispose of the lands of the United States, it may convey to or recognize such rights in the Indians, even a title equal to fee simple, as in its judgment is just. . . . *When Congress intends to delegate power to turn over lands to the Indians permanently, one would expect to and doubtless would find definite indications of such a purpose.*

Hynes v. Grimes Packing Co., 337 U.S. 86, 103-04, 69 S.Ct. 968, 979, 93 L.Ed. 1231 (1949) (emphasis added). The legal standard for recognized title rests upon the clear intent of Congress. "There is no particular form for congressional recognition of Indian right of permanent occupancy. It may be established in a variety of ways but there must be the definite intention by congressional action or authority to accord legal rights, not merely permissive occupancy." *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 278-79, 75 S.Ct. 313, 317, 99 L.Ed. 314 (1955).

The Navajo tribe suggests that land withdrawn by the Executive Order of January 8, 1900, was permanently reserved by Congress. This congressional intent can be found in the Appropriations Act of May 27, 1902, 32 Stat. 264. This act provides for the purchase of the title of certain settlers located at Tuba City within the 1900 executive order reservation. In particular, the appropriations allowed the Secretary of the Interior to purchase the rights and improvements of about 20 Morman [*sic*] families at Tuba City. On its face, this statute does not show a "definite intention by congres-

sional action or authority to accord legal rights." Moreover, nothing in the legislative history cited by the Navajo tribe indicates such a clear purpose. Indeed, the Navajo position leads to an anomalous result. The Hopi village of Moencopi is within the 1900 executive order reservation. One stumbling block to passage of the 1934 Act was the presence of this Hopi village. The Navajo tribe would read the status of the Moencopi village completely out of the 1934 Act.

The Act of March 3, 1927, 44 Stat. 1347, states:

> Changes in the boundaries of reservations created by Executive order, proclamation, or otherwise for the use and occupation of Indians shall not be made except by Act of Congress . . . .

(codified at 25 U.S.C. § 398d); *see also* Act of May 25, 1918, 40 Stat. 570 (codified at 25 U.S.C. § 211) ("No Indian reservations shall be created, within the limits of the States of New Mexico and Arizona, except by Act of Congress."). A law review writer has argued that the 1927 Act is a congressional recognition of compensable tribal property interests in executive order reservations. Note, *Tribal Property Interests in Executive Order Reservations: A Compensable Indian Right*, 69 Yale L.J. 627 (1960). The Navajo tribe argues the Court should adopt the views of this article. The question is one of first impression. *Cf. United States v. Southern Pacific Transportation Co., supra* at 687.

In *Healing v. Jones*, 174 F.Supp. 211 (D.Ariz. 1959), the Court either implicitly rejected or overlooked

the argument that compensable interests were created by the 1927 Act. The *Healing* Court held that equitable interests in the 1882 executive order reservation were not vested until congressional recognition in 1958. *Id.* at 216; Note, *supra* at 639. Whether by oversight or omission, the *Healing* Court is correct. On its face, the 1927 Act does not show a "definite intention by congressional action or authority to accord legal rights." Rather, the Act merely limits executive rights and clearly defines congressional initiative. From the bulky legislative history of the 1927 Act, the only direct evidence as to congressional intent comes with the House Report to a prior version of the Act which was vetoed by the President on other grounds.

> Nothing in this bill is intended to in any manner change or alter the ownership or legal and equitable title to the lands described by its terms. The question of what rights the Indians may have in and to Executive order reservations will not be affected by its passage and the courts can squarely decide that issue without reference to this legislation.

H.R.Rep. No. 763, 69th Cong., 1st Sess. (1926). The House and Senate Reports on the final 1927 Act are silent on the issue of recognized title. *See* S.Rep. No. 1240, 69th Cong., 2d Sess. (1927); H.R.Rep. No. 1791, 69th Cong., 2d Sess. (1927). Although the Navajo tribe can point to language of individual members of Congress expressing a concern to vest permanent rights to the Indians, these speechs are hardly dispositive. C. Sands, Statutes and Statutory Construction § 48.13. Therefore, the Court concludes that the 1927 Act recognized no

compensable property interests in the Indian tribes on executive order reservations.

D. *Who are the Holders of the Vested Equitable Interests*

The granting clause of the 1934 Act states:

> . . . [description of lands], are hereby permanently withdrawn from all forms of entry or disposal for the benefit of the Navajo and *such other Indians* as may already be located thereon; however, nothing herein contained shall affect the existing status of the Moqui (Hopi) Indian Reservation created by Executive order of December 16, 1882.

(emphasis added). As a named grantee, the Navajo tribe is one holder of the equitable interests. The Court takes judicial notice that a Hopi village existed at Moencopi on June 14, 1934. Moencopi is within the 1934 Act land grant, and, therefore, the Hopi are within the "such other Indians" clause and are holders of equitable interests.

The issue arises whether any other Indian tribe may be a grantee within the meaning of the 1934 Act? The Hopi tribe urges the Court to rule that, as a matter of law, the Hopi are the only "other Indians" referred to by the 1934 Act. After all, the legislative history to the 1934 Act demonstrates a congressional concern solely for the Hopi and Navajo tribes. The defect in the Hopi argument is that Congress was capable of naming the Hopi tribe if it wished to limit the grant solely to the Hopi and Navajo. The Court declines to

reach this issue. This action only requires the Court to decide between the competing claims of the Navajo and Hopi. 25 U.S.C. § 640d-7. The Court holds below that the Hopi interest in the 1934 Act lands is tied to Hopi occupation, possession, or use of the lands on June 14, 1934. Inasmuch as an Indian tribe's presence within the 1934 area does not vest a proportionate undivided interest in the entire 1934 reservation, the Court need not decide whether the Hopis are the sole "other Indians" under the 1934 Act.

E. *What is the Nature and Extent of the Holdings*

The granting clause of the 1934 Act withdraws land "for the benefit of the Navajo and such other Indians as may already be located thereon." The Hopi tribe argues that the words "as may already be located thereon" merely designate the recipients of the 1934 Act. The Navajo tribe argues that these words both designate the grantees and limit the interest of the grantees to parcels of land actually occupied on June 14, 1934.

> Any words in a conveyance which operate to designate a conveyance are called "words of purchase" . . . . In contrast therewith, any words in a conveyance which operate to designate the extent of the interest acquired by a conveyee are called "words of limitation."

Restatement Property § 312 Intro. Note. The issue, therefore, is whether "as may already be located thereon" are words of limitation or words of purchase or both? The Court must first look to the language of the

statute to resolve the question. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197, 96 S.Ct. 1375, 47 L.Ed.2d 668 (1976).

The plain wording of the 1934 Act is ambiguous. For example, the 1934 Act grants an equitable interest in "vacant, unreserved, and unappropriated" public lands. Vacant lands are those lands which are absolutely free, unclaimed, and unoccupied. *Donley v. Van Horn*, 49 Cal.App. 383, 193 P. 514, 517 (1920). Under the Navajo interpretation of the 1934 Act, Congress granted an equitable interest in these vacant lands to the Hopi only if the Hopi occupied the land. The condition nullifies the grant. If Congress wished to limit the "such other Indian" grant to land actually occupied, Congress could do so in plainer language. *See Missionary Society v. Dalles*, 107 U.S. 336, 339, 2 S.Ct. 672, 27 L.Ed. 545 (1882) (1848 Act confirms and establishes title to certain land occupied by missionaries, not exceeding 640 acres, on the date of enactment); *cf. Tee-Hit-Ton Indians v. United States, supra*, 348 U.S., at 291, 75 S.Ct. 1313 (Douglas, J., dissenting) (1884 Organic Act for Alaska states Indians shall not be disturbed in possession of lands actually in their use and occupancy). The Hopi interpretation is also troublesome. The title of the 1934 Act states "Exterior Boundaries of Navajo Reservation in Arizona." Nonetheless, the Hopi tribe claims an undivided one-half interest in most of the reservation.

The congressional record on the 1934 Act is sparse. The Senate and House reports, which largely incor-

porate an explanatory letter from the Secretary of the Interior, are of little guidance. The Secretary addresses Hopi land rights in one terse sentence.

> It is of importance to observe that section 1 (p. 4, lines 12 to 14, inclusive) contains a provision safeguarding the rights of the Hopi Indians to their lands, which are centrally located within the present Navajo Reservation.

S.Rep. No. 1012, 73d Cong., 2d Sess. 2 (1934); H.R. Rep. No. 1602, 73d Cong., 2d Sess. 2 (1934). However, page 4, lines 12 to 14, merely preserves the existing status of the 1882 Hopi Reservation. *See* H.R. 8927, 73d Cong., 2d Sess. (April 3, 1934). The Congress is silent as to the meaning of the preceding "such other Indians" clause.

Apparently, only one legislative hearing was held on the boundary bill in 1932. ***See A Proposed Bill to Define the Exterior Boundaries of the Navajo Reservation in Arizona: Hearing on S. 2213 Before the Senate Comm. on Indian Affairs,*** 72d Cong., 2d Sess. (1932). The hearings concerned a bill proposed by the Bureau of Indian Affairs relating to Hopi-Navajo segregation.[8] ***Id.*** at 3. The bill not only contained the "such other Indians as may already be located thereon" clause, but

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[8] Senators Hayden and Bratton originally introduced a bill to eliminate "checkerboard" control of the lands in northeastern Arizona and New Mexico between Indian and private landowners. S. 5557, 71st Cong., 3d Sess. (Jan. 5, 1931). No action was taken on this bill pending further study upon the area. **See Report of H. J. Hagerman on the Navajo Indian Reservation,** S.Doc. No. 64, 72d Cong., 1st Sess. (1932). The proposed bill of the Bureau of Indian Affairs not only eliminated checkerboard ownership of the land, but also provided a comprehensive solution to the persistent problems between the Navajos and the Hopis.

also authorized the Secretary of the Interior to set apart from time to time lands within the boundary bill for the exclusive use and benefit of the Hopi. *Id.* at 4. The proposed bill made no mention of the 1882 Hopi Reservation. No senator expressed his views on the meaning of the "such other Indians as may already be located thereon" language; however, the Assistant Commissioner of Indian Affairs submitted for the record minutes of four meetings between administrators of the Indian Bureau and representatives of the Hopi villages. At these meetings, the Indian Bureau explained the "whole meaning of this bill." *Id.* at 29.

The first meeting took place on the First Mesa with members of the Tewa, Sichumovi, and Walpi villages.

> Mr. Stewart: Now we are going back to section 1 of the bill, especially that part reading that the lands in those lines are to be permanently for the benefit of the Navajos and such other Indians as may already be located thereon. Now I want you to especially bear in mind that by the "as may already be located thereon" that is put in the bill to especially protect the rights of the Hopi Indians to the lands they occupy around here and there is absolutely no chance of the Hopis' rights to these lands being disturbed.
>
> Now we are going on to that part reading: "*Provided further,* That the Secretary of the Interior is hereby authorized to determine and set apart from time to time for the exclusive use and benefit of the Hopi Indians, such areas within the Navajo boundary line above defined as may in his judgment be needed for the use of said Indians."
>
> I will explain to you that this means that at any

> time in the future if the Hopi Indians want a separate boundary line for themselves the Secretary of the Interior can set that aside. I want to assure you that it only contemplates a separate Hopi boundary line if the Hopi Indians themselves want it. As Mr. Radcliffe explained a little while ago, suggestions have been made to us by our own field men and white persons outside the Indian Service who are apparently friendly to the Hopis that certain lines should be adopted as their permanent boundary lines. Those lines involve this one large area here which covers all of these villages and the lands the Hopis have been using. . . . That area covers about 500,000 acres and in addition to that area it has been suggested that an area of about 32,000 acres be set aside for the use of Moencopi Wash Hopi Indians.
>
> Mr. Radcliffe: The area on the Moencopi Wash is outside the Hopi reservation.
>
> Mr. Stewart: Should the Hopi Indians decide that they want separate boundaries we propose to fence the lands that are set aside for them.

Id. at 34-35. A similar explanation was given at each subsequent meeting. *See id.* at 39 (Minutes of meeting at Second Mesa, villages of Mishongovi and Shipaulovi) ("Now I want especially for you to bear in mind that by the 'as may already be located thereon' that is put in the bill to especially protect the rights of the Hopi Indians to the lands they occupy around here and there is absolutely no chance of the Hopis' rights to these lands being disturbed"); *id.* at 54 (Minutes of meeting at Third Mesa, Oraibi village) ("We put that phrase 'and such other Indians as may already be located thereon' in the bill so as to protect especially the

rights of the Hopi Indians to what is called their reservation"); *id.* at 68 (Minutes of meeting at Third Mesa, villages of Hotevilla and Bacabi) ("That phrase 'and such other Indians as may already be located thereon' was especially put in this bill so as to protect the rights of the Hopi Indians in there to this so-called Hopi Reservation. In other words, to protect their rights to the land they are now using and occupying. I want to emphasize that fact, that the bill as now drawn does not in any way affect or change the present so-called Hopi Reservation"). This administrative interpretation of the boundary bill was presented to the Senate, and presumably, is consistent with the congressional understanding of the 1934 Act.

The proposed bill of the Bureau of Indian Affairs did not preserve the 1882 executive order reservation. The "as may already be located thereon" language was added to protect Hopi property rights. Commissioner of Indian Affairs Rhoads explains the addition in a letter of September 22, 1932, to M. Billingsley, a friend of the Hopi:[9]

> Regarding your view that the present proposed bill does not define any particular area for the Hopis, and hence will give title to all the lands to the Navajo—including the present Hopi areas— . . . there is enclosed our revised copy of the bill . . . .
>
> Your particular attention is invited . . . [to these lines] reading as follows:

[9] The letter is reproduced at Navajo Ex. 94.

> Are thereby permanently withdrawn from all forms of entry or disposal for the benefit of the Navajo and such other Indians as may already be located thereon.
>
> It will be readily seen that this language will fully protect the rights and interests of the Hopi Indians within the area covered by the proposed bill until such time as the Hopi Indians themselves agree to some definite boundary, which we hope will be somewhat along the lines indicated on the enclosed blue prints.

See also Letter from C. J. Rhoads to Otto Lomavitu (Sept. 24, 1932) (change was made to fully protect rights and interests of Hopi Indians within the area).[10] The new clause did not quiet the controversy, however. After the 1932 congressional hearing, the Bureau eliminated all reference to a segregated area for the Hopi Indians and added a proviso that the bill would not affect the status of the 1882 Hopi Reservation. Letter from Ray Wilbur to M. Billingsley (Jan. 5, 1933); Letter from Henry Scattergood to Edgar Miller (Jan. 14, 1933).[11]

After Senator Hayden introduced an amended Navajo boundary bill in February 1933, no mention was made of the Hopi-Navajo land dispute. S. 5696, 72d Cong., 2d Sess. (Feb. 28, 1933). Although no longer affecting the status of the 1882 Hopi Reservation, the new bill continued to withdraw the land "for the benefit of the Navajo and such other Indians as may already be located thereon." The only meaning this clause could

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[10] The letter is reproduced at Navajo Ex. 95.

[11] These letters are reproduced at Navajo Ex. 101 and 102.

plausibly be given in light of the legislative history is to protect the rights and interests of the Hopi tribe to the land they were occupying and using outside the 1882 Reservation on June 14, 1934. Inasmuch as the 1934 Act did not attempt to separate Hopi and Navajo property interests, the Hopi tribe and the Navajo tribe each received an undivided one-half interest in these lands. However, the Navajo attempt to limit Hopi rights and interests to land actually occupied by the Hopi is misplaced. The 1934 Act protects both Hopi occupancy and land use. For example, grazing land and religious shrines may fall within the scope of the land grant to the Hopi. These issues present a mixed question of law and fact, however, and the Court will not rule at this time on what types of land uses are sufficient to create a property interest under the 1934 Act. After discovery, the Court can determine which kinds of Hopi possession or use on June 14, 1934 were substantial enough to create property rights within the area set aside by the boundary bill. Therefore,

IT IS ORDERED:

1. The Navajo tribe's motion to dismiss the third claim for relief is granted.

2. The Navajo tribe's motion to dismiss the amended complaint is denied in all other respects.

3. The Hopi tribe's motion for summary judgment is denied.

4. The Navajo tribe's motion for summary judg-

ment is granted insofar as it is consistent with this memorandum and order.

5. Counsel for the Navajo tribe will prepare a form of judgment consistent with this opinion, approved by the Hopi tribe as to form only, and lodge it with the Court within ten (10) days from the filing of this order.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

ABBOTT SEKAQUAPTEWA, Chairman of the Hopi Tribal Council of the Hopi Indian Tribe, for and on behalf of the Hopi Indian Tribe and all villages, clans, and individual members of the Hopi Tribe,

Plaintiff,

vs.

PETER MacDONALD, Chairman of the Navajo Tribal Council of the Navajo Indian Tribe, for and on behalf of the Navajo Indian Tribe and all villages, clans, and individual members of the Navajo Tribe,

Defendant.

No. Civ. 74-842 Pct. WPC

PARTIAL JUDGMENT

Filed: June 2, 1978

This Court having considered the cross-motions of the respective parties seeking this Court's determination of the meaning and effect of the Act of June 14, 1934, 48 Stat. 960, in the context of the circumstances presented by this action; the Court having read the said motions and the memoranda and documentary evidence submitted by the respective parties in support thereof; the Court having entered its Memorandum and Order thereon dated April 5, 1978; and the Court having considered plaintiff's motion for reconsideration and entered its Memorandum and Order Dated May 5, 1978 denying the said motion,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. Pursuant to the Act of December 22, 1974, 25 U.S.C. § 640d et seq. (Supp. 1976), this Court has jurisdiction over the plaintiff and the plaintiff properly appears herein for and on behalf of the Hopi Indian Tribe and all villages, clans and individual members thereof, and over the defendant and the defendant properly appears herein for and on behalf of the Navajo Indian Tribe and all villages, clans and individual members thereof, and this Court has jurisdiction over the subject matter of The First and Second Claims for Relief of the Amended Complaint but does not have subject matter jurisdiction over The Third Claim for Relief of the Amended Complaint herein; wherefore judgment is hereby entered in defendant's favor dismissing The Third Claim for Relief of the Amended Complaint.

2. The plaintiff is not collaterally estopped in any respect from asserting property rights under the 1934 Act.

3. As used herein, the term "Subject Lands" shall mean those certain lands, including both surface and subsurface interests, situated in the State of Arizona, specifically described in Act of June 14, 1934 (48 Stat. 960), except:

a. The lands described in the Executive Order of December 16, 1882;

b. The lands in the State of Arizona included within the Navajo Treaty Reservation (pro-

claimed August 12, 1868) (15 Stat. 667);

c. Lands taken from the Tusayan National Forest and added to and made a part of the Western Navajo Indian Reservation by the Act of May 23, 1930 (46 Stat. 378), and by the Act of February 21, 1931 (46 Stat. 1204);

d. Privately owned lands relinquished under Section 2 of the Act of June 14, 1934 (48 Stat. 960); and

e. Privately owned lands validly purchased by the Navajo Tribe.

4. The Navajo Tribe is a holder of equitable interests in the Subject Lands. The Hopi Tribe of Indians does not have any right, title or interest in or to any portion of the Subject Lands other than its interest in those lands referred to in paragraph 5 below and as between the parties herein, the Navajo Tribe has exclusive ownership, use and control (subject only to the trust title of the United States) in and to all portions of the Subject Lands other than those lands referred to in paragraph 5 below. The Court will not decide whether or not any other Indian tribes may have an equitable interest in the Subject Lands.

5. The Hopi Indian Tribe and the Navajo Indian Tribe each have an undivided one-half interest in and to any and all of the Subject Lands which were possessed, occupied or used by the Hopi Indian Tribe on June 14, 1934; *provided, however*, that the Court

reserves for future determination the type or types of land use which may be sufficient to bring any of the Subject Lands within the provisions of this paragraph 5; *further provided, however,* that the Court reserves for future determination all questions relating to partitioning of any such lands; and *further provided, however,* that the Court reserves for future determination the effect, if any, of these proceedings upon lands which have been patented or allotted to any individual or entity, including but not limited to any member of the Navajo Tribe or the Hopi Tribe.

6. The undersigned is of the opinion that this judgment involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this order as authorized by 28 U.S.C. § 1292(b) may materially advance the ultimate termination of this litigation. It is ordered that all proceedings herein, except such depositions as either party may in good faith believe are necessary to preserve the testimony of ill or aged persons, be stayed for ten days from the date of this order, and if within such ten days, either party shall apply to the United States Court of Appeals for the Ninth Circuit for permission to appeal from this judgment, the proceedings shall be further stayed on the same basis pending determination of such application and of the appeal, if it is allowed.

DATED June 2, 1978,

/s/ William P. Copple
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

ABBOTT SEKAQUAPTEWA, Chairman of the Hopi Tribal Council of the Hopi Indian Tribe, for and on behalf of the Hopi Indian Tribe and all villages, clans, and individual members of the Hopi Tribe,

Plaintiff,

vs.

PETER MacDONALD, Chairman of the Navajo Tribal Council of the Navajo Indian Tribe, for and on behalf of the Navajo Indian Tribe and all villages, clans, and individual members of the Navajo Tribe,

Defendant.

No. Civ. 74-842 Pct. WPC

MEMORANDUM AND ORDER

Filed: May 15, 1978

The Hopi tribe's motion for reconsideration raises no new issues. Although the Hopi argue that the Act of June 14, 1934, 48 Stat. 960, granted them an exclusive interest in lands solely occupied or used by the Hopi, the Bureau of Indian Affairs and the Congress eliminated all reference to a separate and segregated reservation for the Hopi within the land affected by the 1934 Act. A federal court cannot arbitrarily draw boundary lines where Congress has chosen not to do so.

As noted in the memorandum and order of April 5, 1978, the Court declines to rule whether the Hopi are the only "other Indians" referred to by the 1934 Act. Apparently, the Paiute Indians occupied lands affected by the 1934 Act on June 14, 1934. *Cf.* 25 U.S.C. § 640d-8. Whether the Paiute Indians are holders of equitable interests under the 1934 Act cannot be decided in their absence, and need not be decided in this action under 25 U.S.C. § 640d-7. Therefore,

IT IS ORDERED:

1. Plaintiff's motion for reconsideration is denied.

2. Counsel for the Navajo tribe will prepare a revised form of judgment. When drafting the revised form of judgment, counsel will be guided by the following:

(A) The judgment will not set forth a legal boundary description of the lands affected by the Executive Order of December 16, 1882. The Court need not consider the exact boundary line of the lands affected by the 1882 Executive Order until final determination of the boundary in supplementary proceedings in *Healing v. Jones*, 210 F. Supp. 125 (D. Ariz. 1962), *aff'd* 363 U.S. 758 (1963).

(B) The lands in issue in this action are governed by the pleadings. Fed. R. Civ. P. 7(a).

(C) The Court will not at this state of the litiga-

tion quiet title to any of the lands in issue in either tribe.

(D) When counsel cannot resolve disputes over language, counsel will conform the language of the judgment to the language of the Court's prior memorandum and order.

Counsel for the Navajo tribe will personally consult with counsel for the Hopi tribe to obtain his approval of the judgment as to form only. The revised form of judgment will be lodged with the Court within ten (10) days from the filing of this order. If counsel for the Hopi tribe does not agree with the revised form of judgment, he shall, within five (5) days after the form of judgment is lodged, file with the Court the Hopi tribe's objections or proposed changes and additions to judgment.

DATED May 15, 1978.

/s/ William P. Copple

United States District Judge

APPENDIX B

STATUTORY PROVISIONS INVOLVED

48 Stat. 960

73d CONGRESS. SESS. II. CH. 521. JUNE 14, 1934.

[CHAPTER 521.]

AN ACT

To define the exterior boundaries of the Navajo Indian Reservation in Arizona, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the exterior boundaries of the Navajo Indian Reservation, in Arizona, be, and they are hereby, defined as follows: Beginning at a point common to the States of Arizona, New Mexico, Colorado, and Utah, thence west along the boundary line between the States of Arizona and Utah to a point where said boundary line intersects the Colorado River; thence down the south bank of that stream to its confluence with the Little Colorado River; thence following the north bank of the Little Colorado River to a point opposite the east boundary of the Grand Canyon National Park; thence south along said east boundary to the southeast corner of section 5, township 30 north, range 6 east, Gila and Salt River base and meridian, Arizona; thence east to the southeast corner of section 4; thence south to the southwest corner of section 10; thence east to the southeast corner of section 10; thence south to the southwest corner of section 14; thence east to the northwest corner of the northeast quarter section 23; thence south two miles to the southeast corner of the southwest quar-

ter section 26; thence west one half mile to the southeast corner of section 27, township 30 north, range 6 east, Gila and Salt River base and meridian, Arizona; thence south seven miles to the southwest corner of section 35, township 29 north, range 6 east; thence east one mile; thence south one and one half miles to the southwest corner of the northwest quarter section 12, township 28 north, range 6 east; thence east through the center of section 12 to the range line between ranges 6 and 7 east; thence south along said range line five and one half miles to the southeast corner of section 1, township 27 north, range 6 east; thence west three miles to the southwest corner of section 3, township 27 north, range 6 east; thence south five miles to the southeast corner of section 33, township 27 north, range 6 east; thence east along township line between townships 26 and 27, six and one half miles, to the northeast corner of the northwest quarter section 3, township 26 north, range 7 east; thence south two miles to the southeast corner of the southwest quarter section 10, township 26 north, range 7 east; thence east four and one half miles to the southeast corner of section 8, township 26 north, range 8 east; thence north four miles to the northwest corner of section 28, township 27 north, range 8 east, Gila and Salt River base and meridian; thence east one mile to the southeast corner of section 21; thence north four miles to the northeast corner of section 4, township 27 north, range 8 east, thence east along township line between townships 27 and 28 north to its intersection with the Little Colorado River; thence up the middle of that stream to the intersection of the present west boundary of the Leupp Extension Reservation created

by Executive order of November 14, 1901; thence south along the present western boundary of said extension to where it intersects the fifth standard parallel north; thence east along said standard parallel to the southwest corner of township 21 north, range 26 east, Gila and Salt River base and meridian; thence north six miles to the northwest corner of township 21 north, range 26 east; thence east twelve miles to the northeast corner of township 21 north, range 27 east; thence south two miles; thence east twelve miles; thence south four miles; thence east along the township line between townships 20 and 21 north to the boundary line between the States of New Mexico and Arizona; thence north along said boundary line to the point of beginning. All vacant, unreserved, and unappropriated public lands, including all temporary withdrawals of public lands in Arizona heretofore made for Indian purposes by Executive order or otherwise within the boundaries defined by this Act, are hereby permanently withdrawn from all forms of entry or disposal for the benefit of the Navajo and such other Indians as may already be located thereon; however, nothing herein contained shall affect the existing status of the Moqui (Hopi) Indian Reservation created by Executive order of December 16, 1882. There are hereby excluded from the reservation as above defined all lands heretofore designated by the Secretary of the Interior pursuant to section 28 of the Arizona Enabling Act of June 20, 1910 (36 Stat.L. 575), as being valuable for water-power purposes and all lands withdrawn or classified as power-site lands, saving to the Indians, nevertheless, the exclusive right to occupy and use such designated and classified lands until they shall be re-

quired for power purposes or other uses under the authority of the United States: *Provided*, That nothing in this Act contained shall be construed as authorizing the payment of proceeds or royalties to the Navajo Indians from water power developed within the areas added to the Navajo Reservation pursuant to section 1 of this Act; and the Federal Water Power Act of June 10, 1920 (41 Stat.L. 1063), and amendments thereto, shall operate for the benefit of the State of Arizona as if such lands were vacant, unreserved, and unappropriated public lands. All valid rights and claims initiated under the public land laws prior to approval hereof involving any lands within the areas so defined, shall not be affected by this Act.

Sec. 2. The Secretary of the Interior is hereby authorized in his discretion, under rules and regulations to be prescribed by him, to accept relinquishments and reconveyances to the United States of such privately owned lands, as in his opinion are desirable for and should be reserved for the use and benefit of the Navajo Tribe of Indians, including patented and nonpatented Indian allotments and selections, within the counties of Apache, Navajo, and Coconino, Arizona; and any Indian so relinquishing his or her right shall be entitled to make lieu selections within the areas consolidated for Indian purposes by this Act. Upon conveyance to the United States of a good and sufficient title to any such privately owned land, except Indian allotments and selections, the owners thereof, or their assigns, are hereby authorized, under regulations of the Secretary of the Interior, to select from the unappropriated, unreserved,

and nonmineral public lands of the United States within said counties in the State of Arizona lands approximately equal in value to the lands thus conveyed, and where surrendered lands contain springs or living waters, selection of other lands taken in lieu thereof may be of like character or quality, such values to be determined by the Secretary of the Interior, who is hereby authorized to issue patents for the lieu lands so selected. In all selections of lieu lands under section 2 of this Act notice to any interested party shall be by publication. Any privately owned lands relinquished to the United States under section 2 of this Act shall be held in trust for the Navajo Tribe of Indians; and relinquishments in Navajo County, Arizona, excluding Indian allotments and selections, shall not extend south of the township line between townships 20 and 21 north, Gila and Salt River base and meridian. The State of Arizona may relinquish such tracts of school land within the boundary of the Navajo Reservation, as defined by section 1 of this Act, as it may see fit in favor of said Indians, and shall have the right to select other unreserved and nonmineral public lands contiguous or noncontiguous, located within the three counties involved equal in value to that relinquished, said lieu selections to be made in the same manner as is provided for in the Arizona Enabling Act of June 20, 1910 (36 Stat.L. 558), except as to the payment of fees or commissions which are hereby waived. Pending the completion of exchanges and consolidations authorized by section 2 of this Act, no further allotments of public lands to Navajo Indians shall be made in the counties of Apache, Navajo, and Coconino, Arizona, nor shall further Indian homesteads

be initiated or allowed in said counties to Navajo Indians under the Act of July 4, 1884 (23 Stat.L. 96); and thereafter should allotments to Navajo Indians be made within the above-named counties, they shall be confined to land within the boundaries defined by section 1 of this Act.

Sec. 3. Upon the completion of exchanges and consolidations authorized by section 2 of this Act, the State of Arizona may, under rules and regulations to be prescribed by the Secretary of the Interior, relinquish to the United States such of its remaining school lands in Coconino, Navajo, and Apache Counties as it may see fit; and shall have the right to select from the vacant, unreserved, and nonmineral public lands in said counties lieu lands equal in value to those relinquished without the payment of fees or commissions.

Sec. 4. For the purpose of purchasing privately owned lands, together with the improvements thereon, within the boundaries above defined, there is hereby authorized to be appropriated, from any funds in the Treasury not otherwise appropriated, the sum of $481,879.38, which sum shall be reimbursable from funds accruing to the Navajo tribal funds as and when such funds accrue and shall remain available until expended: *Provided*, That title to the land so purchased may, in the discretion of the Secretary of the Interior, be taken for the surface only: *Provided further*, That said funds may be used in purchasing improvements on any land within said boundaries or on leased State school land within the boundaries above defined, provided the State

of Arizona agrees to the assignment of said leases to the Navajo Tribe of Indians on a renewable and preferential basis, and provided the Legislature of said State enacts such laws as may be necessary to avail itself of the exchange provisions contained in section 2 of this Act, and disclaim any right, title, or interest in and to any improvements on said lands.

Approved, June 14, 1934.

Act of December 22, 1974, Pub.L.93-531, 88 Stat. 1715, Section 8.

25 U.S.C. § 640d—7. *Determination of tribal rights and interests in land—Authorization to commence and defend actions in District Court*

(a) Either tribe, acting through the chairman of its tribal council for and on behalf of the tribe, is each hereby authorized to commence or defend in the District Court an action against the other tribe and any other tribe of Indians claiming any interest in or to the area described in the Act of June 14, 1934, except the reservation established by the Executive Order of December 16, 1882, for the purpose of determining the rights and interests of the tribes in and to such lands and quieting title thereto in the tribes.

Allocation of land to respective reservations upon determination of interests

(b) Lands, if any, in which the Navajo Tribe or Navajo individuals are determined by the District Court to have the exclusive interest shall continue to be a part of the Navajo Reservation. Lands, if any, in which the Hopi Tribe, including any Hopi village or clan thereof, or Hopi individuals are determined by the District Court to have the exclusive interest shall thereafter be a reservation for the Hopi Tribe. Any lands in which the Navajo and Hopi Tribes or Navajo or Hopi individuals are determined to have a joint or undivided interest shall be partitioned by the District Court on the basis of fairness and equity and the area

so partitioned shall be retained in the Navajo Reservation or added to the Hopi Reservation, respectively.

Authorization for exchange of reservation lands

(c) The Navajo and Hopi Tribes are hereby authorized to exchange lands which are part of their respective reservations.

Denial of Congressional interests in merits of conflicting claims; liability of United States

(d) Nothing in this section shall be deemed to be a Congressional determination of the merits of the conflicting claims to the lands that are subject to adjudication pursuant to this section, or to affect the liability of the United States, if any, under litigation now pending before the Indian Claims Commission.

Payment of legal fees, court costs and other expenses

(e) The Secretary of the Interior is authorized to pay any or all appropriate legal fees, court costs, and other related expenses arising out of, or in connection with, the commencing of, or defending against, any action brought by the Navajo or Hopi Tribe under this section.